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No. 36, Original

MICHAEL RODAK, JR., CLERK

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1969

THE STATE OF TEXAS,

Plaintiff,

v.

THE STATE OF LOUISIANA,

Defendant.

**REBUTTAL BRIEF OF THE STATE OF  
LOUISIANA IN ANSWER TO THE BRIEF OF  
THE STATE OF TEXAS IN SUPPORT OF  
THE SPECIAL MASTER'S REPORT**

WILLIAM J. GUSTE, JR.,  
Attorney General,  
State of Louisiana.

JOHN L. MADDEN,  
Assistant Attorney General.

EDWARD M. CARMOUCHE,  
Special Assistant  
Attorney General.

SAM H. JONES,  
Special Assistant  
Attorney General.

JACOB H. MORRISON,  
Special Assistant  
Attorney General.

EMMETT C. SOLE,  
Special Assistant  
Attorney General.

OLIVER P. STOCKWELL  
Trial Counsel

OLIVER P. STOCKWELL,  
Special Assistant  
Attorney General.

*argued*

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**PRELIMINARY STATEMENT**

While there have been several briefs written by both sides of this controversy, nevertheless, in view of the importance of this case in establishing the boundary between the State of Texas ("Texas") and the State of Louisiana, ("Louisiana"), and the effect that it may have on other cases decided and to be decided by this Court, establishing boundaries between other states where a navigable stream is involved, we are taking the liberty of filing this additional brief, with the hope that it may, with clarity, pinpoint the issues to be decided by the Court in this case.

**POINT I**

Texas, in filing this suit, limited the portion of

the boundary to be settled from the Gulf of Mexico to the 32nd degree of north latitude. The decision in this case will fix the point of departure and direction of the lateral boundary between Texas and Louisiana separating Louisiana's three marine miles submerged land claim from Texas' three league historical boundary in the Gulf. As to the remainder of the boundary from the 32nd degree of north latitude to the 33rd degree of north latitude, the Special Master ruled, in a memorandum opinion dated March 25, 1971, "The northern part of the boundary between the States [Texas and Louisiana] beginning at the Sabine River, has been established. Such is not now before the Special Master. The only disputed boundary involved in this case is that on the Sabine River."

(Insert ours) This means Louisiana's boundary from the 32nd degree north latitude to the 33rd degree of north latitude commences on the *west* bank of the Sabine River, and extends north along the Treaty Boundary of 1819.<sup>1</sup> If the report of the Special Master is accepted, there will be a jog in Louisiana's western boundary where the 32nd degree of north latitude intersects the Sabine River.

According to the findings of the Special Master, the southern portion of the boundary commencing at

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<sup>1</sup> The "Treaty Boundary of 1819" and "Treaty of 1819" both refer to the Treaty of Amity, Settlement and Limits between Spain and the United States in 1819. When we refer herein to the Treaty Boundary of 1819, it includes the boundary as confirmed by the treaty between the United States and Mexico in 1828, between the United States and the Republic of Texas in 1838 and the boundary as surveyed and staked in 1840-41.

the 32nd degree of north latitude would commence in the geographic middle of the Sabine, whereas, the boundary of Louisiana north from the 32nd degree of north latitude would start on the west bank of the Sabine River. The anomaly of this ruling is that Louisiana's boundary from the 32nd degree of north latitude to the 33rd degree of north latitude follows the Treaty Boundary of 1819, and not the language contained in Louisiana's Constitution of 1812, on which Texas relies, while, according to the ruling of the Special Master, Louisiana is bound by the language of the Constitution of 1812, from the 32nd degree of north latitude south to the Gulf of Mexico, and is not entitled to the Treaty Boundary of 1819, as to that portion of its boundary.

## POINT II

Another anomaly in this case is: Why does Texas, at this late hour, disclaim its tacit understanding with Louisiana not to push the boundary settlement pending litigation on the Tidelands issue? Texas, at page 32 of its brief stated:

"Louisiana asks the Court to take judicial knowledge of World War II, followed by the extended tidelands controversy during which it claims a 'tacit' understanding that this boundary controversy would not be pushed, as a reason for excusing its acquiescence and failure to file a lawsuit since 1941. While each party perhaps had its own good reason to delay filing a suit against its neighboring State, we disclaim any agreement, tacit or otherwise, which would have

prevented either State from filing a suit to resolve this question at an earlier date.”

This statement cannot be reconciled with the evidence in the record.

Texas introduced in evidence as Exhibit “C”, Item 13, a letter from Bolivar E. Kemp, former Attorney General of Louisiana, addressed to Price Daniel, then Attorney General of Texas, dated May 1, 1951, in which it was stated in the concluding paragraph:

“In conclusion, I might state that, informally, some few years ago, Mr. Madeen [Madden] mentioned the question to one or more officials of your state. It was their view, Mr. Madden informs me, that no action be taken until the settlement of the Tidelands controversy.”

This letter of Mr. Kemp was written to Mr. Daniel in answer to a letter of Mr. Daniel, dated April 24, 1951, stating that it had come to his attention that Louisiana was asserting claim to the entire bed of the Sabine. It must be remembered that Governor Jones wrote the Governor of Texas in 1941, officially claiming, on behalf of Louisiana, the entire bed of the Sabine to the west bank. The letter of Bolivar Kemp confirmed that Louisiana was claiming to the west bank, and mentioned the correspondence of 1941. Before Bolivar Kemp inserted the concluding paragraph quoted above, he mentioned that, until trespasses had been made on its land, there would be no occasion to litigate the question.

When the present case was being argued before Judge Van Pelt, on December 16, 1970, Oliver P. Stockwell, one of the attorneys for Louisiana, in the presence of Mr. Daniel, stated:

"That is correct. But I would like to make this observation, that in Mr. Daniel's brief and in some of these exhibits they refer to actions that were taken by Louisiana in this Tideland litigation. Now you will find in even Mr. Daniel's exhibits a letter from Bolivar Kemp, who was Attorney General, that it was his impression while this Tideland litigation was pending which started in 1949 they were not going to try to adjust this boundary. I think Mr. Daniel will admit that. In other words, they didn't want to get this boundary between the two states involved in this litigation." [referring to the Tideland litigation] (Tr. pp. 78, 80 and 81.)

Again it was stated by Oliver P. Stockwell:

"If I might speak a little on acquiescence, of course the question of Port Arthur—most of this has been done since 1941, and during this period when we had this kind of understanding of not doing anything—they can't argue that they didn't know Louisiana's position then because the Governor wrote the Governor of another sovereign state, putting them on notice." (Tr. p. 107).

These remarks were not then disputed by Mr. Daniel.

Mr. Bonnacarrere, Secretary to the Mineral Board of the State of Louisiana, in his testimony, particularly at pages 141, 146, 148, 236 and 237, emphasized

the fact that there was a tentative agreement that no action would be taken on the Texas-Louisiana boundary until the Tidelands litigation was concluded. It must be remembered that Texas filed this suit *after* its Tidelands claim had been adjudicated by this Court, although Louisiana was and still is involved in litigation over its Tidelands.

Texas must consider its plea of acquiescence and prescription is on shaky grounds because most of the acts relied on by Texas took place *after* Governor Jones' letter in 1941.

### POINT III

Another anomaly in this case is the holding by the Special Master that the portion of the boundary involved in this suit is in the geographic middle of the Sabine, which is contrary to the ruling of this Court in *State of Louisiana v. State of Mississippi*, 202 U.S. 1, 26 S.Ct. 405, 50 L.Ed. 913 (1906), which involved the interpretation of the same Constitution of Louisiana as it related to its eastern boundary. This Court, in that case, in establishing the boundary between Mississippi and Louisiana, interpreted the phrase, "in the middle of", as being in the "thalweg", and established the boundary between Mississippi and Louisiana in the deep water sailing channel. The Court also held that the "thalweg" doctrine applied to lakes, estuaries and bays and made it clear that once title had vested in Louisiana, Congress was powerless to deprive Louisiana of any of its territories without the consent of the Legislature of Louisiana.

## POINT I: ARGUMENT

For the Court to fully appreciate the various actions taken by the United States and Louisiana during the early history of this boundary dispute, it is necessary to consider the topography and habitation of the area involved. Louisiana Exhibit K, Items 2, 7, 10 and 12 shows the land along the eastern shore of Sabine Pass, Sabine Lake and the lower end of Sabine River as low and marshy. From the survey plat made in 1901,<sup>2</sup> the Court will observe that towns were on the west bank of Sabine Pass, Sabine Lake and the lower Sabine River, but none exist on the east bank in this area. This is true even today, as the plats will show. On the west bank are the towns of Sabine City, Port Arthur, Orange and other smaller settlements.

Shortly after the Treaty of 1819, the Legislature of Louisiana adopted a resolution, in 1820, approved on March 16, 1820, providing:

“11. La. A., 1820, Resolution, p. 126 Approved March 16, 1820.

That the Governor be requested to correspond with the President of the United States, on the subject of running off and marking the western and northern boundary line of the State of Louisiana, to wit: the line beginning on the Sabine river, at the thirty-second degree of north latitude, thence running north to the northern most part of the thirty-third degree of latitude, thence along

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<sup>2</sup> Louisiana Exhibit K, Item 7.

the same parallel of latitude of the Mississippi river.”

This resolution referred to the landed portion of the boundary, which is now recognized as corresponding to the Treaty of 1819 boundary. There was no need at that time to survey the water boundary for Louisiana owned the bed of the Sabine as a sovereign state.

As we have already pointed out in our prior briefs, when the Parish of Caddo was created in 1838 (La. Ex. A, Item 16), the western boundary was established along the “boundary line of the United States”, which was the Treaty Boundary of 1819. When the Parish of Sabine was created on March 7, 1843 (La. Ex. A, Item 18), the western boundary was on the west bank of the Sabine, following the line between the United States and the Republic of Texas, which was the Treaty Boundary of 1819. This was true also when the Parish of DeSoto was created in 1843 (La. Ex. A, Item 17). These were all *before* Texas was admitted into the Union as a state in 1845. These acts firmly established that the Louisiana Legislature accepted and recognized as its boundary the Treaty Boundary of 1819.

In our prior briefs, we have discussed the area known as the “neutral zone” created in 1806 by agreement between the United States and Spain,<sup>3</sup> which lasted until the Treaty of 1819. This neutral zone en-

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<sup>3</sup> For a history of the “neutral zone” and the actions of the United States and Louisiana during this period of time, see Louisiana’s brief in support of its exceptions to the report of the Special Master, particularly “Argument Point A”.

compassed the portion of Louisiana's boundary involved in this suit.

Texas and the Special Master have ignored the effect of this agreement on the western boundary of Louisiana. This agreement was in effect when Louisiana was admitted as a state in 1812, and the admission of Louisiana as a state was subject to this prior agreement; this accounts for the fact that Louisiana was not able, until after the Treaty of 1819, to exercise any jurisdiction over this area.<sup>4</sup> Congressman Poindexter stated it was up to the United States and Spain to settle the western boundary which would then become the permanent boundary of Louisiana.

This was a wild and ungoverned area, as the Court will observe in reading the article by Mr. Haggard.<sup>5</sup> We have also taken the liberty of including in the appendix of this brief a chapter out of the biography of John A. Murrell by Ross Phares, which was published in 1941, entitled "Reverend Devil". The chapter is entitled, "The Free State of Sabine", the title given to the neutral zone. We have also included in the appendix an article by Leon Sugar on the same subject.

As the Court will observe in reading our prior briefs, the lands in the neutral zone were not patented until *after* 1820. Louisiana, recognizing the necessity

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<sup>4</sup> When the admission of Louisiana was debated in the U.S. Congress this agreement was recognized as binding on the United States and Spain and the admission of Louisiana as a state was subject to the agreement. (Louisiana Exhibit F, Item 5, p. 57)

<sup>5</sup> Louisiana Exhibit C, Item 2.

to settle this area, passed the following resolution on March 25, 1824:

“Whereas from the topographical situation of this state, the defence afforded by the military force placed on our western frontier must be partial, and can effectually protect but a small part of the line of invasion, and whereas further, the only way to remedy that is to hold out advantages to the settlers of that part of the state generally known under the name of *neutral ground*.

“Resolved by the Senate and House of Representatives of the state of Louisiana, in General Assembly convened; That our Senators and Representatives in Congress be instructed to use their utmost endeavors to have a speedy confirmation of the claims filed with the said commissioners at Natchitoches, in December last and calling for lands definitively acted upon by congress within the said neutral ground, and that the secretary of state be directed to transmit to the said senators and representatives copies of this resolution.

“Approved, March 25, 1824.” (Emphasis ours) Surveys were then made and land patented in the neutral zone.<sup>6</sup>

When the boundary survey was made in 1840-1841, Mr. Overton, representing the United States, made observations concerning the lawlessness along the boundary being considered.<sup>7</sup> All of this is important when this Court considers what the Legisla-

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<sup>6</sup> Louisiana Exhibit C, Item 3.

<sup>7</sup> Louisiana Exhibit A, Item 13.

ture of Louisiana had in mind when it passed Resolution No. 212, approved on March 16, 1848 (La. Ex. A, Item 19). The preamble of the resolution states:

“Whereas the constitution and the laws<sup>8</sup> of the State of Louisiana, nor those of any other State or territory, extend over the waters of the Sabine river from the middle of said stream to the western bank thereof; and that it is of importance to the citizens living contiguous thereto, and to the people in general, that the *jurisdiction of some State* should be extended over said territory, in order that crimes and offences committed thereupon should be redressed in a speedy and convenient manner.” (Emphasis ours)

It is easy to understand why the Legislature felt this action should be taken, for the *jurisdiction* of Louisiana, as fixed by the language of the Constitution of 1812, extended only to the middle of the Sabine. There existed a serious question as to whether Louisiana could enforce its criminal laws in the west half of the Sabine, although Louisiana’s boundary extended to the west bank, as fixed in the Treaty of 1819. The resolution then goes on to provide:

“Therefore be it resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, 1st. That the constitution and the jurisdiction of the State of Louisiana shall be extended over part of the United

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<sup>8</sup> In the preamble the Legislature was talking about the language of laws and the Constitution and not about Louisiana’s western boundary, which, later in the same resolution, the Legislature recognized as being on the west bank of the Sabine.

States, embraced in the following limits (when-  
ever the consent of the Congress of the United  
States can be procured thereto,) viz: Between  
the middle of the Sabine river and the western  
bank thereof, to begin at the mouth of said river  
where it empties into the Gulf of Mexico, and  
thence to continue along the said western bank  
to the place where it intersects the thirty-second  
degree of north latitude, *it being the boundary  
line between the said State of Louisiana and the  
State of Texas.*" (Emphasis ours)

Here, again, the Legislature was recognizing that  
the boundary line between Louisiana and Texas was  
on the west bank of the Sabine, but that the jurisdic-  
tion of Louisiana, as fixed by the language in its Con-  
stitution of 1812, only extended to the middle of the  
Sabine, but it extended jurisdiction to the west bank  
subject to the consent of Congress.

The Court will recall that the inhabitants on both  
sides of the Sabine, by virtue of the Treaty of 1819,  
were entitled to the use and navigation of the water,  
while by the same treaty the ownership of the river  
was vested exclusively in the United States and thereby  
in Louisiana, the most westerly state, to the left bank.  
This situation, agreed upon in a solemn pact, did none-  
theless pose questions of police jurisdiction.<sup>9</sup> The fact  
that the Legislature stated, "shall be extended over part

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<sup>9</sup> The Republic of Texas, distinguishing customs inspec-  
tion on waters of the Sabine River from legal ownership of the  
River, acknowledged thereby that any jurisdictional act or  
series of acts would in no way imply at any future time owner-  
ship by means of prescription. See the February 10, 1845, letter  
of the Secretary of State for the Republic of Texas to A. J.  
Donelson, U. S. Charge d'Affaires at the Texas Capitol. See  
Appendix A.

of the United States” did not, in any way, mean the Legislature did not recognize Louisiana’s boundary as fixed on the west bank of the Sabine, for, actually, the whole of Louisiana forms part of the United States.<sup>9a</sup>

The resolution then requested the Louisiana Senators to ask Congress for permission for such extension. It is important to consider that in the resolution actually passed, it provides, in the last line in the second paragraph of the resolving portion of the resolution, “boundary line between the State of Louisiana and the State of Texas.” In a copy of the resolution filed with the Congress, the “State of Texas” was left out.<sup>10</sup>

Recognizing the necessity for some established jurisdiction over the west half of the Sabine, the Legislature of Texas passed a resolution, approved March 18, 1848, to instruct its Senators and Representatives to use their best efforts to have Congress pass an act “extending the *jurisdiction* of Texas over half of the waters of Sabine Lake, Sabine Pass, Sabine River, up to the 33rd degree of north latitude.” (Emphasis ours) Here, again, the Legislature of Texas was referring to “jurisdiction” over half of the waters of the Sabine, over which both Louisiana and Texas had concurrent

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<sup>9a</sup> To understand the intent of the Louisiana Legislature one can by analogy see that a coastal state owns at least three miles of area into the sea; yet this area is patrolled not by the State Police but rather by the United States Coast Guard. Conceivably waterborne federal police could have exercised special jurisdiction over the part of Louisiana’s territory between the middle of the river and the west bank—without any derogation of Louisiana’s ownership. Instead the lawmakers wished it to be policed by state authorities applying state laws upon this internal waterway.

<sup>10</sup> Louisiana Exhibit A, Item 19, p. 288-A.

jurisdiction, under the provisions of the Treaty of 1819. Nothing is said about acquiring title to the west half of the Sabine.

Texas now urges that the Act of Congress which was accepted by Texas actually extended its boundary to the west half of the Sabine, depriving Louisiana of title thereto. While certain Louisiana Senators seemingly made no objection to the extension of jurisdiction of Texas over the west half of the Sabine, there was no consent by the Louisiana Legislature to changing the boundary of Louisiana from the west bank of the Sabine, as established by the Treaty of 1819, to the middle of the Sabine and any Act of Congress purporting to have this effect would be unconstitutional under the doctrine announced by this Court in the case of *State of Louisiana v. State of Mississippi*, supra.

There were settlements on the west bank of Sabine Pass, Lake, and River and Texas was in a much better position to police the west half of the Sabine than Louisiana, which had no settlements along these banks. Resolution No. 212 of the Louisiana Legislature of 1848, filed with Congress, firmly established Louisiana's boundary claim to the west bank.

Texas urged, and the Special Master found, that the United States was saving the west half of the Sabine to give to Texas when it was finally admitted into the Union. In our brief, we pointed out that the boundary of Texas and Oklahoma along the Red River is the 1819 Treaty Boundary, which is fixed on the south bank of the Red River, and not in the middle of the stream. Texas attempts to distinguish this situa-

tion from that in this case by urging that the Red River at this junction is non-navigable, whereas, both parties here have admitted that the Sabine is a navigable stream. While we do not agree with this distinction, such an argument certainly cannot be made with reference to that portion of the Red River which forms a part of the boundary between Arkansas and Texas.

The Arkansas Territory was formed by Act of March 2, 1819, effective July 4, 1819, from a part of the Missouri Territory. In 1824 an act was passed by Congress fixing the western boundary of the territory as follows:

“ . . . . the western boundary line of the territory of Arkansas shall begin at a point forty miles west of the southwest corner of the State of Missouri and run south to the right bank of the Red River, and thence down the river and with the Mexican boundary,<sup>11</sup> to the line of the State of Louisiana.”

Congress, in 1824, after the Treaty of 1819, considered that the line of Louisiana coincided with the boundary of Mexico, as established by the Treaty of 1819. Arkansas was admitted as a state on June 15, 1836. The enabling act approved on that date, describes the boundary as follows:

“beginning in the middle of the main channel of the Mississippi river, on the parallel of thirty-six degrees north latitude, running from thence west, with the said parallel of latitude, to the Saint Francis river; thence up the middle of the main

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<sup>11</sup> This was the Treaty Boundary of 1819.

channel of said river to the parallel of thirty-six degrees thirty minutes north; from thence west to the southwest corner of the State of Missouri; and from thence to be bounded on the west, to the north bank of Red River, by the lines described in the first article of the treaty between the United States and the Cherokee nation of Indians, west of the Mississippi, made and concluded at the city of Washington, on the 26th day of May, in the year of our Lord one thousand eight hundred and twenty-eight; *and to be bounded on the south side of Red River by the Mexican boundary line*, to the northwest corner of the State of Louisiana; thence east with the Louisiana State line, to the middle of the main channel of the Mississippi; thence up the middle of the main channel of the said river, to the thirty-sixth degree of north latitude, the point of beginning." (Emphasis ours)

Congress, in passing this enabling act, recognized that Arkansas was bounded on the south side of the Red River, by the Mexican boundary line "to the northwest corner of the State of Louisiana; thence east with the Louisiana State line, to the middle of the main channel of the Mississippi River". This is just another instance in which Congress treated the Mexican boundary as coinciding with the western boundary of Louisiana and another instance in which the United States gave to the State of Arkansas the total of the Red River to its south bank. Again, this was *after* the Treaty of 1819 when the boundary had been settled first between Spain and the United States and, subsequently, Mexico and the United States.

In the case of *State of Oklahoma v. State of Texas*,

258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1921), the Court found "Lanesport, Ark., which is near the Oklahoma boundary, has been the usual head of navigation. . . ." This means this portion of the Red River was navigable.

The United States did not reserve the south half of the navigable portions of the Red River for a future state to be formed to the south, such as Texas. This establishes that there is no merit to Texas' claim that the United States was reserving the west half of the Sabine for Texas when it became a state.

It seems Texas' whole case is based on the theme that, from the date of the Louisiana Purchase, the United States established a firm policy of depriving Spain, and then Mexico, of Texas, so as to make it a part of the United States and give the new state half of the Sabine. While there might be some basis for this argument from comments of some statesmen, it was never the firm policy of the United States. As the Court will observe in reading the discussions between deOnis and Adams, in negotiating the Treaty of 1819, there was strong disagreement between them as to whether Texas formed any part of the Louisiana Purchase, and as to the exact location of the western boundary. (See: Marshall, "A History of the Western Boundary of the Louisiana Purchase", filed in evidence as Louisiana Exhibit M)

The Geological Survey Bulletin 1212, "Boundaries of the United States and the Several States," filed in evidence by Texas as Exhibit H., contained the following plat:

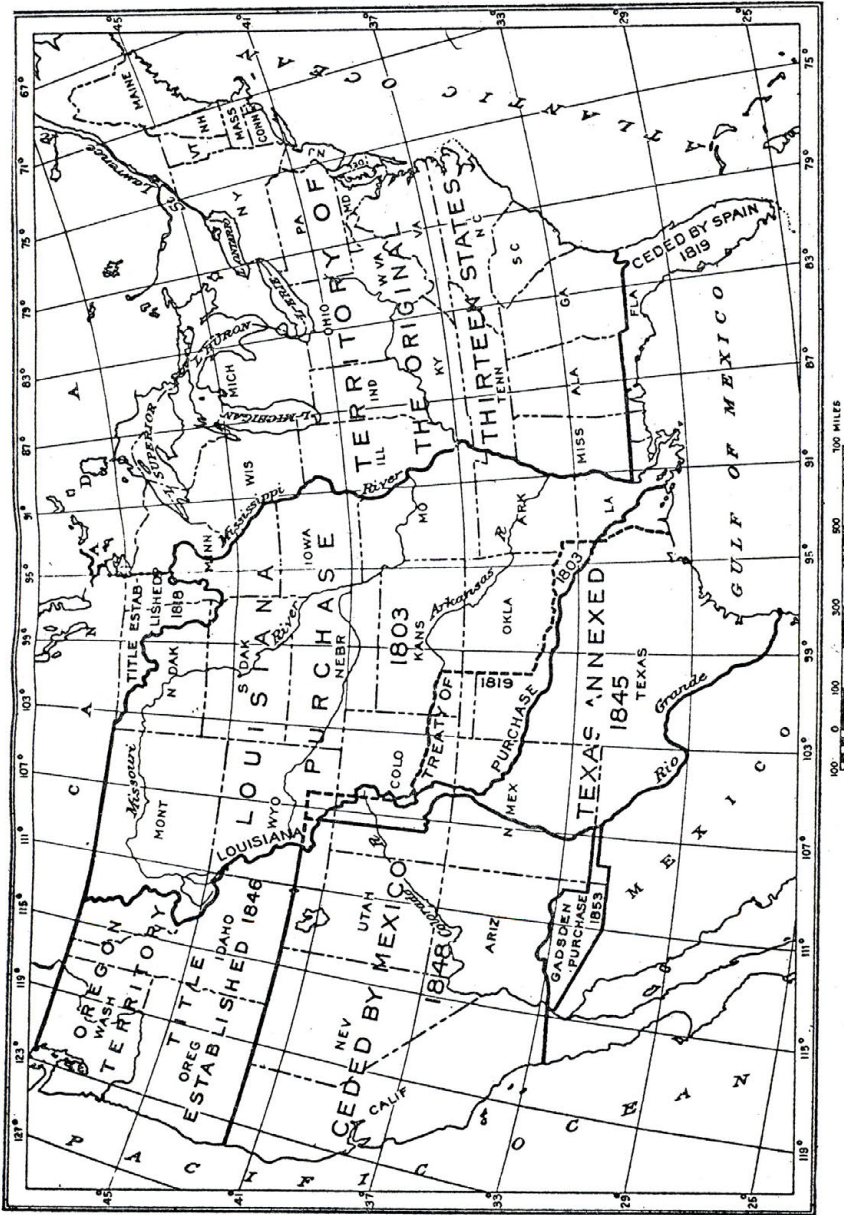


FIGURE 3.—Contiguous United States, showing accessions of territory from 1803 to 1853.

This plat shows territory acquired by the United States from 1803 to 1853; it shows that the original Louisiana Purchase extended from a line near the Atchafalaya River across Louisiana; and that the area involved in this suit was acquired by Louisiana in the Treaty of 1819.

In an interesting article published in the Southern History Association Journal, Volume V, September, 1901, No. 5, by Professor John R. Ficklen, entitled, "Was Texas Included In The Louisiana Purchase?", the writer, in the conclusion of that article, stated:

"In reviewing calmly the facts that have been given in the preceding pages it seems to the writer a correct conclusion to declare that the present State of Texas has no just claim to be regarded as a part of the territory purchased from France in 1803. As we have seen, that claim rests upon the fact that in the year 1685 the adventurous LaSalle, who three years before had taken possession in grandiloquent terms of the Valley of the Mississippi and of the coast as far as the River of Palms in Mexico, landed by accident on the coast of Texas and there planted a colony. This colony by the next year had dwindled from 185 to 45 persons and in the following year only about twenty of these were left. LaSalle had not proposed to settle on that coast, and it was his intention to remove his dwindling colony as soon as possible, to the banks of the Mississippi. Before this intention could be carried out, he was killed, and his settlement was destroyed by the Indians.

“As soon as the Spaniards learned of what they regarded as an invasion of their rights, they sent a strong force into Texas, and carried off all the members of LaSalle’s colony that they could find among the Indians—an act for which they were never called to account by France. They then proceeded to plant missions and a presidio in Texas (1690). After three years these were abandoned; but twenty-three years later, when the French once more threatened occupation, the Spaniards took permanent possession of Texas and with missionaries and colonists they held it against the French for forty-six years—until, in fact, all contention was quieted by the transfer of Louisiana to Spain.

“Spain had also a claim of prior discovery, weak until reinforced by occupation; but she based her strongest claim on the exclusion of the French from the soil of Texas during a long period and upon the fact that between Adaes (Adais) and Natchitoches a boundary line was practically agreed upon. The French, it is true, had protested on several occasions against Spanish occupation, but to borrow a term from international law, this seem to the Spaniards like establishing ‘a paper blockade’ around Texas, and they very properly refused to recognize a claim which France never enforced. It is noteworthy that LaSalle’s settlement had no real significance in the history of Texas.

“In the nomenclature of town and river, in the government and life of the people, no influence, with one slight exception, save that of Spain, can be detected until the American settlers came

crowding into the province during the nineteenth century. As to the maps, we have seen that they differ so much as to the limits of Louisiana that they neutralize one another. The curious phenomenon has been noted that the best Spanish map (Lopez's) gives (doubtfully) Texas to the French; while the best French maps (Vaugondy and D'Anville) give it to the Spaniards!

"Finally the treaty, it is to be remembered, by which the United States acquired Louisiana gave it 'with the extent it now has in the hands of Spain and which it had when France possessed it.' Now, as 'Louisiana in the hands of Spain' never embraced Texas under its government, it would certainly seem that by this clause our country was precluded from advancing a claim to the province. The two clauses should be regarded as reinforcing each other in support of the Spanish claim.

"The Floridas and Oregon, which at various times, were claimed by the United States as portions of the Louisiana Purchase, have been declared by the sober judgment of history to have formed no part thereof. A similar judgment, it may be predicted, will finally be pronounced in the celebrated case of the Louisiana Purchase vs. Texas."

This demonstrates that there is proof that the area of Louisiana encompassed in the neutral zone was not part of the Louisiana Purchase and the title to that area was only firmly settled by the Treaty of 1819. This is another reason why the western boundary of Louisiana was not established until the Treaty of 1819.

We are not talking about the United States transferring territory to Louisiana after it became a State; we are talking about the establishment of a boundary which was unsettled at the time Louisiana became a state and could not be fixed permanently in view of the agreement of 1806 between Spain and the United States. When the boundary was established by the Treaty of 1819 between the United States and Spain (the only two parties with authority to make such a settlement) that boundary then became the western boundary of Louisiana,<sup>12</sup> and no action subsequent to that time by the United States could deprive Louisiana of this boundary. The only serious question in this case is whether Texas acquired the west half of the Sabine by acquiescence and prescription, when both Louisiana and Texas had concurrent jurisdiction over the total Sabine?

Texas has not produced any creditable evidence from an official source of the United States that it was not the intention of the United States, when it negotiated the boundary settlement in 1819, to fix Louisiana's western boundary. Louisiana was not acquiring any property by "donation", "coalescence", or "osmosis", as Texas argues, but was having its boundary established. The official acts of the United States from that day forward justify this position.

The official plat filed by the Commission that

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<sup>12</sup> This was recognized by Congress and the two statesmen most familiar with the boundary, Secretary of State Henry Clay and President John Quincy Adams. See pages 20-22 of Louisiana's Brief in Support of Exceptions to Report of the Special Master.

made the survey in 1840-41 shows the State of Louisiana on one side and the Republic of Texas on the other. It did *not* purport to show the west half of the Sabine between these two entities as the territory of the United States.

After the survey of 1840-1841, the United States resurveyed the townships from the 32nd degree of north latitude to the 33rd degree of north latitude, establishing the west boundary of Louisiana as coinciding with the treaty boundary of 1819. Actually, Louisiana lost territory by the resurvey in this area that was formerly thought to belong to it.<sup>13</sup>

The first resurvey was made on December 23, 1845, by George W. Morris, Deputy United States Surveyor, and the next resurvey was made by J. R. Barbour, Deputy United States Surveyor, in 1895. Both of these surveys show that Louisiana's boundary coincided with the treaty of boundary of 1819, as surveyed and staked.

T. G. Bradford's *Illustrated Atlas, Geographical, Statistical and Historical of the United States and the Adjacent Countries*, published in Philadelphia in 1838, entered, according to Act of Congress, in the year 1838 in the clerk's office of the clerk of court of Massachusetts describes the boundaries of Louisiana (page 147) :

#### "STATE OF LOUISIANA

EXTENT. BOUNDARIES. The State of Lou-

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<sup>13</sup> Pp. 24-25 of Louisiana's Brief In Support of the Exceptions to the Report of the Special Master.

isiana comprises that part of the old Territory of Louisiana which lies south of 33° N. Lat., and the section of the Province of West Florida west of the Pearl River, and south of 31° N. Lat. The western bank of the Sabine from its mouth to the 32d parallel, and a straight line drawn thence due north to the 33d parallel of latitude, form its western boundary, the latter parallel is its northern limit to the Mississippi; that river is its eastern boundary to 31°, and Pearl River from thence to its mouth.”<sup>14</sup>

While Texas, in its brief, quotes arguments by attorneys of Louisiana that appeared in the Public Land Decision of 1910, (Item 1 in Texas’ Exhibit B) nevertheless, the Commissioner determined:

“The West bank of the western channel of the river at this point will be recognized as the boundary between the State of Louisiana and Texas.”

The Commissioner then went on and said:

“The Supreme Court of the United States has sole jurisdiction to finally determine the question of disputed boundaries between States. (Virginia v. Tennessee, 148 U.S. 503) No decision that may be made herein would be binding upon the States. But it is the duty of the Department to determine whether the lands in question are part of the public domain and whether they are of the character of lands that pass to the State of Louisiana

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<sup>14</sup> See letter of November 8, 1972 from Walter W. Ristow, Chief, Reference Department, Geography and Map Division, The Library of Congress to Emmett Sole, to which is attached a copy of the 1838 map of Louisiana, showing Sabine Lake in Louisiana, all of which is part of Appendix A hereto.

under its grant of swamp and overflowed lands. For that purpose it must determine for itself what boundary should be recognized, and such determination must be made according to the elementary rules that control in the question of disputed boundaries.

“The true line in a navigable river between States of the Union which separates jurisdiction of one from the other is the middle of the main channel of the river. If there be more than one channel of a river, the deepest channel is the mid-channel for the purpose of territorial demarcation (*Iowa v. Illinois*, 147 U.S., 1) That is also the rule as between nations if there be no convention respecting it (*Handly v. Anthony*, 5 Wheat. 374; *U. S. v. Texas*, 162, U.S., 1)

“But that rule has no application in this case, for the reason that the boundary between the Republic of Texas and the United States was fixed by convention. Furthermore, the river was not the boundary, but the boundary between said Republic and the United States was the west bank of the river, and such boundary continued to be the east boundary of Texas until the act of July 5, 1848, when the United States consented that the State of Texas may extend its limits from the western bank of the river to the middle of the stream. *It can not be presumed, however, that the United States intended by such legislation to take from the State of Louisiana any part of its territory or to change in any respect the boundaries established by the act of its admission, even if it had authority to do so.* (*Louisiana v. Mississippi*, 202 U.S., 1, 40.)

“You will execute the instructions given in the letter of December 2, 1907.” (Emphasis ours)

In a letter from the Assistant Commissioner of the General Land Office of the Department of the Interior to Mr. S. A. Mayo, dated March 31, 1932, filed as Texas' Exhibit B, Item 6, the Assistant Commissioner again affirmed the ruling in the 1910 case involving the boundary of Louisiana by saying:

“In the case of the State of Louisiana (39 L.D. 63), the facts with reference to the boundary line between Louisiana and Texas were set forth at some length and it was held (syllabus) that

‘For the purpose of determining whether certain islands lying between the two channels of the Sabine River at a point known as the “Narrows” are part of the public domain and of the character of lands that pass to the State of Louisiana under its Swamp land grant, the west bank of the western channel of the river at this point will be recognized as the boundary between the States of Louisiana and Texas.’

“This would appear to fix the boundary line through Sabine Lake, no differentiation between the river and the lake having appeared in any of the treaties or acts of Congress, *supra*.”

This clearly evidenced the position of the Department of the Interior that the boundary of Louisiana was on the west bank of the Sabine, including the west bank of the Sabine Lake even after the passage of the Act of 1848.

Louisiana filed in evidence a composite map furnished it by Texas dated sometime after 1896 (Lou-

isiana Exhibit F, Item 1) which affirmatively states thereon that in 1819 “the boundary between *Texas* and *Louisiana*” was fixed by the Treaty of 1819.

As late as 1960, former Attorney General of Texas Will Wilson recognized before this Court that the Treaty of 1819 “fixed the boundary between Texas and Louisiana.” (Louisiana Exhibit H, Item 1 and page 53 of Louisiana’s Brief in Support of the Exceptions to the Report of the Special Master.)

The only Act of the Federal Government on which Texas relies is the Act of 1848, permitting it to extend its boundary to the middle of the Sabine, which, we urge, only extended the jurisdiction of Texas to the middle of the Sabine, since Louisiana already owned to the west bank of the Sabine.

We urge that Louisiana’s boundary was on the west bank of the Sabine, by virtue of the Treaty of 1819, when Texas was admitted into the Union in 1845. Louisiana’s boundary is still on the west bank of the Sabine.

## **POINT II: ARGUMENT**

Texas is attempting to deprive Louisiana of its land extending from the middle of the Sabine to its west bank. We have already discussed Texas’ change in its understanding with Louisiana not to push the boundary controversy pending the Tideland litigation. Most of the acts relied upon by Texas took place *after* 1941, which may account for this change.

Neither Texas, in its briefs, or the Special Master

in his report, has answered Louisiana's argument that the Treaty of 1819, granting the inhabitants of both sides of the Sabine the "use" and "navigation" of its waters, vested concurrent jurisdiction in Louisiana and Texas over the waters of the Sabine.

This reserved treaty right was considered by the Republic of Texas in correspondence with the United States just prior to the date the Republic of Texas was admitted into the Union as a state. Only the United States has authority to deal with a foreign nation under the United States Constitution. It also controls navigation in navigable rivers even though the river is wholly located within a state and the title to the bed of the river is vested in the state. Even though Louisiana owned the bed of the Sabine to its west bank, it was proper for the Republic of Texas to deal with the United States in connection with the "use" and "navigation" of the waters of the Sabine.

The Republic of Texas sought to exercise some forms of jurisdiction by the right to "use" over the Sabine while acknowledging thereby that the ownership of the entire Sabine belonged and would continue to belong to the United States. Texas implicitly pledged never to claim any ownership rights based on prescription through "use".

On May 30, 1839, David G. Burnet, Acting Secretary of State of Texas, wrote to Richard G. Dunlap, Minister of the Republic of Texas to the United States, directing him to ask the United States Government for permission for Texas customs officials to examine

all ships entering the Pass of the Sabine. From *Annual Report of the American Historical Association for the Year 1907*. George P. Garrison, ed., *Diplomatic Correspondence of the Republic of Texas*, ([Wash., 1908], Part I, p. 400).

Dunlap reported to Texas President M. B. Lamar that the United States Secretary of State John Forsyth was unwilling to concede this right of search within its territorial waters. (Dunlap to Lamar, July 21, 1839, in Garrison, ed., *Diplomatic Correspondence of the Republic of Texas*, I, 411.)

Three years later—August 28, 1842—George W. Terrell, Acting Secretary of State of the Republic of Texas, instructed Isaac Van Zandt, Texas' Charge d'Affaires in Washington, to press the issue again with the United States Government. (*Garrison, ed., Diplomatic Correspondence of the Republic of Texas*, I, 602.) To halt "flagrant violations of [Texas'] revenue laws with perfect impunity," Texas was explicitly requesting United States trading vessels to be obliged to submit to Texas customs inspection in the Sabine Pass. Texas was implicitly recognizing that this inspection, which was normally a part of territorial jurisdiction, would, if graciously granted, not be so considered; that is to say, Texas was willing to recognize that no act of jurisdiction granted to her under the title of "use" would ever be a pretext for invoking prescription.

Texas insisted that customs inspection was necessary lest the port of Sabine become a free port of the world and lest commerce by keel boats a few feet off

shore make a mockery of Texas' commerce regulations. Use of a thing includes the means without which use would be useless, wrote Texas Secretary of State Ashbel Smith to A. J. Donelson, United States Charge d'Affaire at the Texas Capitol, February 10, 1845. [Garrison, ed., *Diplomatic Correspondence* . . . II, 355-358.] (See Appendix "A", hereto for copy of letter from Smith to Donelson.) Texas' revenue laws had to be safeguarded. "A limited jurisdiction for this purpose must be exercised by Texas over the adjacent waters." (Ibid., p. 357). Donelson rejected the claim to inspection as a right but looked forward to an agreement which would protect Texas' rightful interest. (Donelson to Ebenezer Allen, Attorney General of Texas and Secretary of State ad interim, April 7, 1845, Garrison, ed., *Diplomatic Correspondence*, II, 369-373.)

It is obvious that the Republic of Texas recognized that some type of agreement was necessary to govern the "use" and "navigation" of the Sabine, since both nations had jurisdiction over the use and navigation of the Sabine.

The United States authorized Texas to extend its *jurisdiction* to the middle of the Sabine. This meant that where both Texas and Louisiana had concurrent jurisdiction over the "use" and "navigation" of the Sabine, with *Louisiana owning the bed and subsoil of the Sabine to the west bank*, the United States extended the jurisdiction of Texas to the middle of the Sabine so that both states would have the right to

regulate the “use” and “navigation” of the Sabine at least to the middle thereof. This took the place of a compact between Texas and Louisiana. Texas and Louisiana recently entered into a compact with the approval of Congress as to a portion of the Sabine known as the Toledo Bend Project.<sup>15</sup>

At page 36 of our brief in support of Louisiana’s exceptions to the report of the Special Master, the case of *State of Washington v. State of Oregon*, 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909) is cited. In that case, this Court affirmed, on rehearing, its previous decision reported in 211 U.S. 127 (1908). The language of the decision, which is quoted on page 36 of our aforementioned brief, held that the grant of concurrent jurisdiction over the Columbia River, by Congress, did not determine the boundaries between the two states. By the same reasoning, the grant of *jurisdiction* to Texas to half the Sabine did not divest Louisiana of ownership of the bed and subsoil of the Sabine to the west bank.

The Court cited *Nielsen v. State of Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528, (1909), which pointed out that the Act of Congress of March 2, 1853 (c. 90, 10 Stat. at L. 172), organized the Territory of Washington and gave the Territories of Washington and Oregon “concurrent jurisdiction” over all offenses committed on the Columbia River which was the boundary between the two states. The act admitting Oregon as a state dated February 14, 1859 (c.

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<sup>15</sup> Louisiana Exhibit A, Item 23.

33, 11 Stat. at L. 383), gave concurrent criminal and civil jurisdiction of all cases on the Columbia River to Oregon. This is another instance where Congress, by granting concurrent civil and criminal jurisdiction to two adjoining states, did not fix ownership of the bed and subsoil thereto.

There are a number of other situations in which the courts have had to construe treaties, compacts and statutes between states and territories wherein "jurisdiction" was granted over all or part of water bodies without changing the boundary, but in our research we have failed to find any case discussing concurrent jurisdiction where the inhabitants of both states have equal rights in the "use" of the water. This is one more strong case why the United States should regulate the jurisdiction over the "use" and "navigation" of the waters without effecting Louisiana's boundary.

When this case is viewed in the light of the treaty provisions granting to the inhabitants of both sides of the Sabine the equal "use" and "navigation" of the waters, it is quite clear why there was no need for Louisiana to institute suit against Texas to have its west bank boundary recognized. This accounts in large measure for the maps relied on by Texas which have lines in the approximate middle of the Sabine.

Texas relies on numerous maps made for various purposes, largely *after 1941*, as constituting acquiescence by Louisiana to a midstream boundary. Judge Van Pelt, in his report, recognized that these maps

were not made for the specific purpose of establishing the boundary between Texas and Louisiana. Texas was thoroughly familiar with Louisiana's claim and was not misled in any way by any of these maps, statements of some of Louisiana officials, and other unofficial acts of Louisiana in its effort to establish a midstream boundary.

In our brief we pointed out that after the Special Master's report Texas, through James U. Cross, Executive Director of the Parks and Wildlife Department, publicly stated that the big difference created by the Special Master's report on the boundary:

"begins where the land ends.

The line forming the border leaves the mouth of the Sabine River about midway between Texas Point and Louisiana Point, which are the southernmost points of land in the two states, and runs southeasterly, roughly toward the 18-mile light.

The reason for this is the mouth of the old Sabine River traveled in that direction, thus establishing a southeasterly direction for the border extending into the Gulf.

The jetties turn and run in a more southerly direction at that point. Thus the base of the east jetty and a short piece of the jetty extending into the Gulf still lies within Louisiana.

But the remainder of the East jetty, including the safety pass, is in Texas.

The new border is not marked by any visible means.

Cross indicated that Texas game management officers will start patrolling the newly acquired area.”<sup>16</sup>

Here is another instance in which Texas is trying to use a line drawn on a map from the Gulf of Mexico north through the Sabine Pass, Sabine Lake and Sabine River, but disregarding the line on the same map as it extends into the Gulf. This is the type evidence that Louisiana respectfully urges should not be sufficient to deprive Louisiana of its valuable property rights consisting of the bed and subsoil of the west half of the Sabine.

### POINT III: ARGUMENT

The Special Master stated (p. 31)

“The general rule is that when a navigable river constitutes the boundary between two States, the jurisdiction of each State extends to the middle of the main channel of the river. This is known as the ‘thalweg’ or main navigable channel doctrine. The doctrine is based upon equitable considerations and is intended to preserve to each State its equal right in the navigation of the stream *Iowa v. Illinois*, 147 U.S. 1, 7-8 (1893); *Georgia v. South Carolina*, 257 U.S. 516, 521 (1922); *Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940). Where navigation of the river is not involved, there is no reason to apply the thalweg doctrine and ‘in the absence of convention or controlling circumstances to the contrary, each takes to the

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<sup>16</sup> See: Brief of Louisiana in Support of the Exceptions to the Report of the Special Master, Appendix, Item 4.

middle of the stream.' " *Georgia v. S. Carolina*, supra.

Following this, the Special Master commented on the fact that both states concede that they have common rights of navigation on the Sabine by virtue of Section 12, Act of Congress, dated February 15, 1811, the Congressional Act admitting Louisiana as a state (April 8, 1812, 2 Stat. 701) and the 1819 Treaty between the United States and Spain (8 Stat. 252).

An analysis of *State of Georgia v. State of South Carolina*, 257 U.S. 516, 42 S.Ct. 173, 66 L.Ed. 347 (1922) reveals that this case has been cited only eight times. The final decree in this case (259 U.S. 572) reads:

"2nd. Where there are islands, the line is midway between the island bank and the South Carolina shore when the water is at ordinary stage; 3rd. That all islands formed by nature in the Chattooga River are reserved to Georgia as completely as are those in the Savannah and Tugaloo Rivers."

In denying the application of the Thalweg Doctrine, the Court cited the Beaufort Convention between Georgia and South Carolina from which the following is quoted:

"The navigation of the river Savannah at and from the bar and mouth (here follows a detailed description of the course of the river)—is hereby declared to be henceforth equally free to the citizens of both states, and exempt from all duties, tolls - - -."

It also quoted from a South Carolina resolution of 1852 to the effect that the Beaufort Convention fixed the boundary between the two states as "the thread or middle of the most northern branch or stream of the rivers Savannah and Tugaloo, where these rivers have more than one branch or stream, and the thread or middle of these rivers where there is but one branch or stream".

South Carolina had admitted in its answer that where there were no islands the line was the "middle thread of the stream where the rivers flow in one stream or volume." Later South Carolina sought to repudiate this and argued that the true boundary was the low-water mark on the southerly or Georgia bank of each river, and where there were islands, it was on the southerly bank of the most northerly stream or branch of the river, while conceding all islands in the Savannah and Tugaloo to Georgia (but not in the Chattooga).

This Court held that, as the Beaufort Convention fixed the *geographic* middle of the Savannah, Tugaloo and Chattooga Rivers (one continuous stream) as the boundary, the *thalweg* rule did not apply. This case should not be considered as a strong precedent for South Carolina practically "admitted itself out", as it sought to reverse itself in the light of its own pleading.

Of the eight instances—according to Shepard's Citations—in which that case has been cited, not one of them involved this particular point. Two of the

eight cases involved only procedural points.

The Special Master may have been technically correct when he relied on *State of Georgia v. State of South Carolina* in support of his statement at page 32:

“Since the right of navigation of the Sabine is not an issue here, having at all times been open to the citizens of each State, application of the thalweg doctrine is unnecessary.”

The Special Master further said (p. 33):

“Since Congress had provided for *free navigation* on the Sabine as early as February 15, 1811 (Texas’ Exhibit G. pp. 47-50), the only logical meaning to the words ‘thence by a line to be drawn along the middle of said river,’ found in the congressional act which defined Louisiana’s western boundary (Louisiana’s Exhibit A, pp. 66-68), would be a geographic middle.” (Emphasis supplied)

In our brief in support of the exceptions to the report of the Special Master, we naturally countered his argument with the fact that our case is not like that case because, in that case, the Beaufort Convention set the boundary at the middle of the Savannah River, whereas, the Treaty of 1819 set the Texas-Louisiana boundary on the western bank of the Sabine water system.

It is submitted that a valid answer to the holding of the Special Master on the thalweg point also lies in an analysis of the case *State of Louisiana v. State of Mississippi*, *supra*. As we have pointed out in prior briefs, this case held that the boundary be-

tween Louisiana and Mississippi lay in the middle of the main channel from the Pearl River through Lake Borgne, Mississippi Sound and on into the Gulf of Mexico. This meant the "thalweg."

The fact of greatest significance is that the same constitution—that of Louisiana of 1812—was involved in *State of Louisiana v. State of Mississippi*, supra, as is involved in the case at bar. The Enabling Act of Congress which authorized the admission of Louisiana into the United States specified that the navigation of the water boundaries of Louisiana would be "common highways, and forever free, as well to the inhabitants of other states and the territories of the United States". At that time Mississippi was not a state, but constituted one of the territories of the United States. Obviously, this act of admission by the parent sovereign guaranteed to the citizens of Louisiana, and all other states and territories, free rights of navigation. This is exactly the same thing that the Beaufort Convention did as between South Carolina and Georgia. At the risk of repetition, the following is quoted verbatim from the Act for Admission of Louisiana as a State dated April 8, 1812:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana; Provided, That it shall be

taken as a condition upon which the said state is incorporated in the Union, *that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of said state as to the inhabitants of other states and the territories of the United States*, without any tax, duty, impost or toll therefor, imposed by the said state; and that the above condition, and also all the other conditions and terms contained in the third section of the act, the title whereof is herein before recited, shall be considered deemed and taken, fundamental conditions and terms, upon which the said state is incorporated in the Union."

The query is: Why was the Thalweg Doctrine followed in *State of Louisiana v. State of Mississippi*, supra, when there was no more "necessity for it" than there was in *State of Georgia v. State of South Carolina*, supra. Both the Convention and the Act, which apparently are of equal dignity, granted neighboring states and territories equal rights of navigation.

It is interesting to note how similar the language of the Beaufort Convention is to the language contained in the Act of Admission of Louisiana as a state. Unquestionably, when Mississippi was admitted into the union, as authorized by the Act of Congress of March 1, 1817, 3 Stat. Ch. 23, p. 348, she was entitled to all rights of navigation in the water boundaries between that state and Louisiana as they were "common highways, and forever free as well to the inhabitants of said state as to the inhabitants of other states and

the territories of the United States \*\*\*\*\*". At that time Mississippi was a territory.

Interestingly enough, the constitution of Mississippi does not adopt the rule of the Thalweg.

The Act of Admission of Mississippi into the union does not contain any provision for free navigation by neighboring states and territories, as does the act admitting Louisiana. This could hardly make any difference, as Mississippi's right to free navigation was recognized in the Act of Admission of Louisiana. The Act of Admission of Mississippi gives the south and eastern boundaries of Mississippi as follows:

"Thence westerwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne, thence up said river to the thirty first degree of north latitude, thence west along the said degree of latitude to the Mississippi river, thence to the point of beginning."

As pointed out in our brief on page 49, in *State of Arkansas v. State of Mississippi*, 250 U.S. 39, 39 S.Ct. 422, 63 L.Ed. 832, (1919), this Court disregarded holdings by the Supreme Court of Mississippi expressing belief that the geographic middle of the river was the correct boundary, rather than the thalweg, or main navigable channel. As has just been pointed out, even the Constitution of Mississippi appears to fix the boundary in the geographic middle.

It is significant that this decision (*State of Louisiana v. State of Mississippi*) has been cited approximately 45 times according to Shepard Citations and it

has always been cited with approval. Of course, it was not always cited in support of the Thalweg Doctrine because there were other important points in the case such as the principle of acquiescence and prescription. However, the decisions can be accepted as one of the leading cases on the Thalweg Doctrine. Yet, to repeat, this was a case where free common navigation of the water boundaries between Louisiana and Mississippi was in existence by virtue of the Act of Admission of Louisiana dated April 8, 1812.

An examination and analysis of that case reveals that the Court was thoroughly aware of the contents of the Act of Congress of April 8, 1812 because the first paragraph is quoted.

The Act of Admission of Louisiana (adopted *after* the Louisiana Constitution of January 22, 1812), makes the Mississippi and the navigable rivers and waters leading into it and the Gulf "common highways and forever free" for Louisiana's people and those of other states and territories. So, the Mississippi Territory, adjoining Louisiana on the east, was the beneficiary as was the State of Mississippi when it was admitted into the Union in 1817.

The Treaty of 1819 between Spain and the United States gave the "use of the Waters and the navigation of the Sabine to the Sea" to both nations—the exact same privilege to Spain and its successors on the west as the Act of Admission gave to the Mississippi Territory on the east. The same Constitution of Louisiana of 1812 was involved.

*State of Georgia v. State of South Carolina*, held, as found by the Special Master, that, under the Beaufort Convention, both Georgia and South Carolina had common rights of navigation in the Savannah River (just as Spain and the United States had in the Sabine under the Treaty of 1819). So the *Thalweg doctrine* was held *INAPPLICABLE*. Louisiana and Mississippi had common rights of navigation in Pearl River, Lake Borgne and the other boundary waters between them under the Louisiana Act of Admission of April 8, 1812; yet, in that case the Supreme Court held that the *Thalweg Doctrine* WAS applicable. This would appear to throw the two cases in conflict. To repeat and reiterate: if the fact that the two bordering states or territories had common rights of free navigation in the navigable stream that constituted their boundary—thus obviating the necessity for applying the *Thalweg Doctrine*—in one case (*State of Georgia v. State of South Carolina*) why not in the other (*State of Louisiana v. State of Mississippi*)?

It can be strongly argued that in parent cases like *State of Iowa v. State of Illinois*, 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55 (1892), the Court was merely stating the basic historical *reason* for the *Thalweg Doctrine* and was not laying down as a *legal principle* the idea that there *must* be a *necessity* for protecting navigation on behalf of the two adjoining states for the doctrine to apply.

We have here an anomalous and abnormal situation. Louisiana's constitution simply says "middle of the river" when delineating the western and eastern

boundaries of the State. The word "middle" is not defined. Yet we have it defined as the "geographic" middle on the west by the Special Master (because of the existence of free common navigation) and defined as the "middle of the main navigable channel" (the thalweg) on the east (despite the existence of free common navigation).

Texas had contended that there was no well defined or habitually used main channel of navigation in Sabine Pass, Sabine Lake or Sabine River in 1812 or thereafter and, therefore, this is sufficient reason to deny Louisiana's thalweg claim. Quite to the contrary, Louisiana has, in fact, introduced evidence to show the most navigable channel through the Sabine, with this evidence being dated as early as 1838.<sup>17</sup>

House Executive Document No. 147, 47th Congress, 1st Session, is a letter from the Secretary of War transmitting a report of the Chief of Engineers of the result of the survey of the entrance to Sabine Pass, which letter was referred to the Committee on Commerce on March 29, 1882, and which makes several references to the depths in the Sabine and its navigability. See also House Document No. 1290, 61st Congress, 3rd Session.

If the holding in the *State of Georgia v. State of South Carolina* case, *supra*, is followed by this Court then, since Louisiana owns all the islands in the Sabine, it follows that "where there are islands the boundary line between Texas and Louisiana is midway between

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<sup>17</sup> See La. Ex. K, Items 2, 3, 6, 7, 8, 9, 10, 11 and 12, and Appendix "A", Item 4.

the island's bank and the [Texas] shore when the water is at ordinary stage." [South Carolina deleted and Texas added].

### CONCLUSION

We respectfully urge Louisiana's boundary should be recognized as the west bank of the Sabine as established by the Treaty of 1819 and as surveyed and staked and the title to all islands in the Sabine be recognized as belonging to Louisiana.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,  
Attorney General,  
State of Louisiana.

JOHN L. MADDEN,  
Assistant Attorney General.

EDWARD M. CARMOUCHE,  
Special Assistant  
Attorney General.

SAM H. JONES,  
Special Assistant  
Attorney General.

JACOB H. MORRISON,  
Special Assistant  
Attorney General.

EMMETT C. SOLE,  
Special Assistant  
Attorney General.

OLIVER P. STOCKWELL,  
Special Assistant  
Attorney General.

OLIVER P. STOCKWELL  
Trial Counsel

Attorneys for defendant.

**CERTIFICATE**

I, WILLIAM J. GUSTE, JR., Attorney General of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 1972, I served copies of the foregoing brief by transmitting conformed copies of the same, by first class mail, postage prepaid, to the Special Master, the Office of the Governor and Office of the Attorney General, respectively, of the State of Texas, and upon the Solicitor General of the United States, in compliance with Rule 33.2(b) of the Rules of the Supreme Court of the United States, since the Report of Special Master has raised the question of the constitutionality of an Act of Congress of July 5, 1848 (9 U.S. Stat. 245).

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WILLIAM J. GUSTE, JR.,  
Attorney General,  
State of Louisiana.



## INDEX TO APPENDIX\*

*Description**Item  
Number*

1. Article entitled "Reverend Devil" by Ross Phares published in 1941, which is a biography of John A. Murrell, from which is taken a chapter entitled "The Free State of Sabine."
2. Sugar, Leon "Following the Spanish Trail Across the 'Neutral Territory' in Louisiana", Volume 10, La. Hist. Quart. pages 86-93, (Jan.-Oct., 1927).
3. Letter of Walter W. Ristow, Chief, Reference Department, Geography and Map Division, The Library of Congress, Washington, D. C., to Emmett Sole dated November 8, 1972, to which is attached copies of an 1838 map of Louisiana, and the text portion describing the boundaries, from Thomas G. Bradford's *An Illustrated Atlas . . . of the United States* (Boston, Weeks, Jordan and Co., 1838).
4. Letter of Ashbel Smith to A. J. Donelson dated February 10, 1845.
5. House Document No. 365, 25th Congress, 2d Session, being a letter from the Secretary of War transmitting a report respecting the removal of obstructions to the navigation of the Sabine River, which report is dated May 7, 1838, and to which is attached certain plats showing depths in Sabine Pass, and Lake.

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\* The documents forming this Appendix are not part of the official record in this case but is matter of which this Court may take judicial notice.

## APPENDIX

## Item No. 1

## CHAPTER VI

## THE FREE STATE OF SABINE

Back in Tennessee, Murrell found that the old home country was being settled rapidly. It made him nervous to see these changes; opportunities were not so plentiful as they once were.

But Murrell, in his travels, had found a strange new country where "speculations" were plentiful and law was unknown. At first the place had offered him no great inspiration. He merely dashed into it for excitement and adventure, and after filling his pockets passed on. Now, the sight of rapid developments in his home state gave him the urge to move on. He felt cramped and hemmed in here. He began to think of better and more isolated headquarters. His thoughts turned to the Free State of Sabine.

The Free State of Sabine was a freak nation that lay along the eastern side of the Sabine River on the western border of Spanish territory. It was a bastard state that owed no nation homage, and held the respect of none. It was ruled entirely by outlaws, and there was no law except the law of might. Because of its strategic [*sic*] location, it was one of the most talked of places on the continent, as well as the most feared. Practically all traffic in and out of the Southwest had to pass through this country. And because of the immensity of this traffic and the richness

of the cargoes, the outlaw realm became powerful and wealthy, and consequently audacious.

This country was not large, not more than fifty miles wide, with indefinite boundaries on the north and southeast, and no military fortification. A small army could have wiped it off the map. But in spite of the fact that it threatened the very existence of traffic between two important nations and held progress at a standstill along its frontiers, no nation molested it; and its barbarous practices continued until the very name of the place became a word of horror.

Only a strange history in a strange land could have given birth to such a geographical freak. And only a feverish, deep-seated international jealousy would have permitted the existence of such a state.

The history behind the Free State of Sabine dates back almost to Columbus' discovery of America. For it was not long after this event that the French and Spanish came into conflict over land in the western hemisphere.

In the year 1685 an unusual flare of jealousy broke out among the Spaniards. In that year LaSalle, through mistake, missed the mouth of the Mississippi River and landed on the southern coast of Texas. The Spaniards could not accept this extended westward cruise as an accident. They immediately renewed their efforts to colonize Texas. And the French took advantage of LaSalle's bad navigation and laid claim to the Texas territory. But neither nation made any

headway colonizing the territory. Texas was too far from their bases of supplies.

After an official flurry and a lot of talk about "what they would do," the Spaniards relaxed. LaSalle had been murdered; and his followers had starved to death or disappeared otherwise. They forgot about Texas.

Then in 1714 they flew into another fit of jealousy. For in that year a young French merchant by the name of Louis Juchereau de St. Denis appeared at the presidio of San Juan Bautista on the Rio Grande with a cargo of merchandise to peddle. Such audacity was unheard of! Spanish officials went into a hysterical trance over the affair. This brazen, intrusive Frenchman might find their mines; he might call himself an explorer; he might start France to talking about that old LaSalle claim. He was detained at the presidio until the officers became rational enough to decide what to do with him. Then his goods were confiscated and he was rushed off to prison in Mexico City.

And there one of the queerest turns of history took place. St. Denis won the confidence of the officials, headed an expedition of Spaniards organized to settle the eastern frontier, and on the way back, at San Juan Bautista, recovered his goods and as an added flourish, picked up the beautiful granddaughter of the commandant for his wife.

St. Denis led the Spaniards to within fifteen miles of Natchitoches, the French outpost. Here they

established the town of Los Adaes, which in time became the capital of the Texas province. It was a puzzling act, this Frenchman leading foreigners into territory claimed by his own country. But Louisiana at that time was a commercial colony, and St. Denis' orders were to establish trade. It was much easier to trade with Spaniards if they were close to the French storehouses. Commercially and socially the arrangement was satisfactory enough, but from a diplomatic standpoint there was no end to the trouble it brought.

Boundary disputes raged for years. In desperation, and then in boldness Spain would claim the whole of both Texas and Louisiana. But France too knew how to play this ancient diplomatic game. When her move came she would retaliate by claiming for herself all of Louisiana and Texas.

When the United States came into possession of Louisiana in 1803, nothing had been done about a western boundary except a lot of writing and swearing. The United States politely took up the boundary argument. But it soon became no more polite than international diplomacy forced it to be. When the diplomats failed, the armies were called in. The United States was not sufficiently patient to wait with the hope that perhaps another hundred years would in some natural way fix a boundary.

Spain let it be known that she was prepared to defend her territorial claim. The United States republic, now flushed with territory by the Louisiana

Purchase, with a characteristic youthful pride, and aggravated by growing pains, gave the impression that it was ready to take on all comers. And so in the fall of 1806, both nations playing a bold part, and not to be outdone by the other, sent their armies marching viciously toward the disputed territory.

The Spanish army drew up at the west bank of the Sabine River. The American troop camped on the other bank. Soldiers on both sides stood in readiness with loaded guns waiting for the command to fire. But the command never came.

The two opposite generals got together and temporarily settled the matter by agreeing that the territory between the Sabine and the Arroyo Hondo should be neutral ground. Their respective governments ratified the treaty. And in this manner both nations saved their faces without going to war.

But little did either nation realize the outcome of such an agreement. A strict provision of the treaty declared that neither nation should send any armed forces into the neutral zone; no police power of any nature was provided for.

It seemed that geography had gone mad. For here, in an already unruly region where two wild frontiers met, was established a sanctuary for all those who hated law and order. No flag waved over this "No Man's Land"; no law was binding. Soon the riff-raff of the earth came pouring in, outcasts of all countries, fugitives from justice, thieves, robbers, desperadoes of all varieties. It was an outlaw

Utopia. For once within the bounds of this neutral zone he was free of pursuit. No law could touch him here; he might laugh at all laws.

It was a desperate, reckless crew that flocked here for protection, and to live upon the commerce that passed through their state. They robbed and pillaged and murdered to their hearts' content, and preyed upon one another as wild beasts that know no law. They made capital of the jealous dispute between Spain and the United States, and dared anyone to molest them. Of great importance to the prosperity of the outlaws was the fact that the two main highways of the Southwest crossed the Neutral Ground.

What the Natchez Trace was to the Mississippi Valley, the San Antonio Trace\* was to the Southwest. It was the road that St. Denis had established on his first trip to Mexico; and it immediately had become the most important highway of the Southwest. It ran from Natchitoches westward toward Mexico City directly across the Neutral Ground, a most unfortunate circumstance for travelers and traders.

The other road was Nolan's Trace, a branch of the San Antonio Trace that left the older highway just east of the Sabine and crossed the Red River a short distance above the present city of Alexandria. Nolan's Trace was the shortest route from the western plains to the eastern stock market, and during

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\* Often referred to as El Camino Real.

the first half of the nineteenth century thousands of head of horses and cattle were driven over this trail.

There was no route around the Neutral Ground, and it pleased the freebooters to think of the fact.

The longer Murrell thought about the Free State of Sabine the more appealing it became to him. There in the Neutral Ground, an outlaw empire might be established. A shrewd man might become king! The thought set his ambition on edge.

So the Reverend Murrell discarded his Bible and long coat. He bought an extra pistol instead. Then he headed toward the Sabine with fantastic dreams blazing in his head.

Between the San Antonio and Nolan's traces he established himself. His headquarters were a natural marvel. No bandit could have picked a better location. His hideaway was a huge cave near the foot of the highest hill in the region. For miles on all sides open forests of virgin pines spread out in a beautiful, though confusing monotony. Occasionally there was a ravine with its stream of clear water, lined in places with small hardwood trees. But for the most part the country was a meaningless expanse of twisting, pine-covered hills. It was a confusing country to the stranger trying to find his way about.

The cave was an exceedingly large one. It served not only as living quarters, but was sufficiently large to house supplies and stable a large number of horses. A clear rippling spring branch rushed by within a few yards of the entrance. It was a beautiful, iso-

lated, melancholy retreat where the wind forever moaned weirdly and mysteriously among the top of the tall pines.

Before long Murrell had a collection of men around him, bold, deadly ruffians who would rob or kill at the command. The cave became a treasure house. For it was the heyday of the traces. Out of the Southwest came packtrains of silver from the Mexican mines, long droves of cattle and horses from the Texas plains, and back toward the west traveled merchants from Natchitoches, New Orleans, and Europe with their packs of silks and jewels. Many adventurers and home-seekers from the East, lured by accounts of rich lands and opportunities in Texas, headed through the Free State with high hopes, and fortune in pocket.

Murrell knew how to handle these travelers. He had outposts along the traces at strategic points—at Natchitoches, at the inns, and at the river crossings. His scouts kept him informed upon all the important business along the traces. These aids were men of various professions, inn-keepers, stock raisers, muleteers, farmers, traders. Many, perhaps most of them, did not know the extent of the workings of the gang they served. They did their small part, received their rewards, asked no questions, and kept their mouths hushed. A few became involved, more or less innocently, with Murrell, and were then afraid to turn back. It seems that for a number of years Murrell was the ruling spirit in the Neutral Ground.

It was along Nolan's Trace that Murrell committed his greatest depredations. It seemed that a curse hung over this road and those who traveled it from the time it was blazed until it faded out of use. Drama, tragedy, and romance marked the old road all the days of its impetuous life.

Philip Nolan, the man who laid out the trail, was a handsome, adventurous, young Irishman, who resided at Natchez on the eastern edge of Spanish territory. His business was dealing in horses. The Spanish army needed horses, and the animals were scarce around Natchez. Nolan saw a business opportunity and made capital of it. For a number of years he rounded up horses from the Texas plains and sold them to the officials of the Spanish dominion. It was over this road that he ran hundreds of galloping wild ponies, and in the doing accumulated a modest fortune.

But the Spaniards became suspicious about the information this American was accumulating concerning the province of Texas. While herding horses in Texas he was shot by the Spaniards, who reported to his bride of a few weeks that he had merely deserted her and his country. And then, to add misery to misfortune, a certain Edward E. Hale wrote a little book which he called *The Man Without a Country*, and through an unfortunate coincident he named his leading man Philip Nolan. And due to the circumstances and erroneous reports (later clarified by a companion of Nolan who after twenty years in Mexican prisons escaped and gave the true story) about

Nolan, many believed that the American trail blazer was the young lieutenant in the Reverend Hale's book.\*

Nolan's Trace, like its blazer, was destined through all its days, to a turbulent, eventful existence. Due to its remoteness it was always a dangerous road.

Before Murrell came to the Free State outlaws had from time to time stampeded droves of horses and cattle along the traces and carried them off to markets of their own selection. It had been rather easy in the matted undergrowth and canebreaks along the winding creeks. The outlaws usually knew the country better than did the drivers. And they knew how to hold their advantage. Occasionally the drivers offered resistance, but usually after a few shots they stampeded as easily as the cattle and wild horses. But Murrell had a better plan. He watched the long droves of stock go by on the way to market. Murrell had patience. These men would be back. "Why," he reasoned, "should he trouble himself to drive these stubborn wild beasts for days over wilderness roads and fight the dust and flies at their heels?" Why run any risk of complications at the market place? His prospective victims enjoyed the job too much themselves. It would grieve him much to deprive them of the pleasure! True, they would spend part of their earnings in the towns. But there was always plenty.

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\* Reverend Hale regretted this misleading circumstance; and to prove that it was all a coincidence and that he meant no injustice to the memory of Philip Nolan, he wrote another book about the real Philip Nolan and titled it Philip Nolan's Friends.

And if the correct time and place was chosen by a specialist, the task of collecting the stock money was a frivolous detail.

Murrell planned his work with the precision of an architect. He arranged his procedure to fit the circumstance; his knack for calculating was remarkable. If an attractive drove of cattle crossed the Sabine River on the way to market, some of his men were usually on hand to investigate the matter. It was a popular procedure for some member of the gang to "accidentally" fall into company with the cow drivers and find out their business—where they expected to sell their stock, what such cattle were expected to bring at the market at that time, when they would be coming back, by what route. It was all very casual; travelers on long journeys have to talk about something. Men who talked too freely usually never lived to warn others.

After the stagecoaches started running across this country, the outlaws attacked many of them and staged bold and merciless holdups. But Murrell never made a practice of this type of robbery. It was too difficult to do away with a stage coach and an entire crew. These coaches ran on a schedule, and the disappearance of one would have been rather conspicuous. Murrell was too shrewd to run such risks. Usually he found that it was not necessary to run risks in the Neutral Ground.

If prosperous looking gentlemen were passing through No Man's Land, scouts, as a rule, spotted

them. There were stops along the trace that the stages had to make. At any of these places some member of the gang might fall into conversation with a rich traveler, suggest a drink of water, or perhaps something stronger. Any scheme to get the traveler out of sight. Once this was accomplished, the rest was easy. He was killed, his possessions taken, and the robber disappeared into the forest before anyone could know that anything unusual had happened. If a traveler appeared to be a good prize, or likely to be hard to handle, a member of the gang might engage transportation over the route to see that plans were not frustrated. In some crowded inn they might be forced to sleep together. Any circumstance that necessitated privacy was arrangement enough.

On one occasion one of Murrell's scouts reported that a "rich prize" was in transit to Texas. He had stayed for awhile at the scout's inn and had made himself very impressive by telling of his wealth. A "companion" was immediately dispatched to accompany him. Shortly after dark the stagecoach drew up at a small inn that the passengers might refresh themselves and new horses might be hitched to the stage. When the impressive traveler entered the inn his "companion" and two other men, who appeared as if from nowhere, followed closely behind him. They unceremoniously rushed him into a side room. The door flew closed. A muffled scream was heard. When someone finally ventured into the room, no one was to be found. The back door was open, and outside all was quiet and apparently peaceful. When the alarm

had been spread and preparation for pursuit made, it was discovered that all the horses in the corral had been turned out, and not even the stage horses could be found. The next morning the supposedly rich man's body was found in the well back of the house.

The San Antonio Trace was much older, better known, and traveled more than Nolan's Trace. There were a few villages on it, and alongside it, or near, were farmhouses. It was for over a century the most important highway west of the Mississippi.

During the heyday of the Free State of Sabine the population along the trace reached the lowest ebb in many years. Several years before the signing of the neutral zone treaty the Spanish had abandoned their capital [*sic*] at Los Adaes. And when war had seemed likely between the United States and Spain, most of the remaining Spaniards immigrated further into Texas or Mexico. After the outlaws took charge, only a small part of the old population remained—a few stubborn Spaniards, unconcerned half breeds, half-wild French traders, and a sprinkling of Anglo-Saxons who had established homes and dared to stay there and live in spite of the fact that no government existed. Before long citizens and traveling merchants were pleading for police protection. They had been left to a cruel fate.

When conditions had become almost intolerable, the United States government took it upon itself to clean up this nest of outlaws and thugs. But the United States was quickly warned by Spain that it

was strictly against the provisions of the treaty of 1806 for any armed Americans to enter this territory, and that any such act would be construed as a hostile move toward Spain and an attempt to invade Spanish territory. The Americans had made a reputation for pushing over frontiers. And Spaniards were not inclined to take any unnecessary chances with the aggressive Americans. They were determined that they should come no closer to Spanish territory than the eastern boundary of the neutral zone. And so conditions became steadily worse in the Neutral Ground. It was perhaps the most dangerous strip of territory on the continent. Helpless people there continued to be robbed and murdered, and worse still, these marauders became so bold they made raids upon surrounding territory and then dashed back into their reserve. If the bandit could escape over the boundary of the Free State, he was safe from all punishment.

Further alarmed by this growing menace, the United States government proposed a joint campaign against the outlaws. But Spain did not choose to accept the offer. Apparently she was jealous of all moves the Americans might make, and she felt that this outlaw empire might serve as a buffer state against future aggressions.

In 1819 Spain recognized the Sabine River as her eastern boundary. And the Neutral Ground might technically have come to an end at that time. But for two years Spain refused to ratify the treaty in an effort to induce the United States not to recognize

her rebellious colonies. However, in 1821 Mexico won her independence from Spain, and the United States then had Mexico to deal with instead of Spain. Again it seemed that the old problem would be settled and the terrible Neutral Ground brought to an end, but the new Mexican republic, ambitious as a result of her accomplishments, refused to recognize the treaty made by the mother country.

The marauders continued their depredations while diplomats at the capital cities politely argued over the boundary question, and discussed lengthy plans, which resulted in nothing.

After 1821 the United States ventured to strengthen her claim to the Sabine River by sending Zachary Taylor into the disputed territory with orders to establish a fort and look after the interests of the United States there. In 1822 Taylor established [*sic*] Fort Jesup on the San Antonio Trace on the watershed between the Red and Sabine rivers, about twenty miles from the latter. The chief duties of the troops were to guard the border, and to impress Mexico with the strength of the United States. And though the country was not officially recognized as American soil, the presence of the army gave a rather definite impression that it was only a matter of time until the Free State of Sabine would become a part of the American commonwealth.\*

Murrell did not care to become involved with

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\* This boundary problem was not officially settled until 1836 when Texas became an Anglo-Saxon republic.

soldiers. And for that reason he confined most of his plundering to the trace to the south. But there was one place along the San Antonio Trace that was too tempting for any adventurer of Murrell's caliber to miss. That was Shawneetown, located on the trace three miles west of Fort Jesup.

The United States government in the very early days of Fort Jesup passed a law preventing whiskey being sold within three miles of the flag post of the cantonment. Shawneetown sprang up at the three-mile limit. Anything the government prohibited at Fort Jesup, Shawneetown took pride in furnishing. Liquor, women, gambling, entertainment of all shades. There was open house all time.

Shawneetown was one place along the San Antonio Trace that was equipped to entertain the toughest traveler. It was the most wicked resort along the entire trace; the village boasted of the fact, and travelers advertised it well. It was a place where the mightiest made the rules and the weaker obeyed. It was the place where East and West met. To the Anglo-Saxon on his way west it was the jumping-off place; to the Latin on his way to the United States it was his introduction to the so-called civilization of the East. Many men spent their last night on earth there. Fortunes changed hands rapidly. It went on from day to day. Men shuffled dirty, limp cards over rough table tops and lost their fortunes in the doing, and then rode off over the same road that brought them, more desperate than ever.

The code of the frontier ruled. It was not a very definite thing, but strange acts were done in the name of it. Gunfire turned over-ambitious gamblers into unidentified corpses. The sound of cracking pistols, a shuffle of chairs, the pounding of galloping hoofs, another mess for the proprietor to clean up. No one seemed to bother greatly. New adventurers came, had their sprees, and yesterdays were forgotten or became heroic stories for stimulated minds to relate. It was a place where men got by on their toughness.

The place was about as far west as white women without family protection went. When the soldiers came, they flocked nearby. Men bargained for them, fought over them, cursed them and left them to their trade. No decent woman ventured near Shawneetown.

Many languages were spoken here, French, Spanish, English and half a dozen other European tongues; and then there was always the Shawnee Indians with their barbaric babble; they acted as servants, and watched the strange, mysterious drama that took place, and drew their own opinions about the pale-face civilization. It was a motley crew that visited Shawneetown: teamsters along the trace, soldiers from the fort, horse traders, horse rustlers, merchants, land prospectors, professional gamblers, outlaws, vagabonds, travelers extraordinary, adventurers in general. It was a place where the high and the low gathered, and dignity and vulgarity met with joined hands.

Shawneetown was too attractive a temptation for

any young blade with an adventurous nature to miss. Here Murrell met kindred spirits. He enjoyed the society there, and spent his easy money with the entertainers; but he always had his eyes and ears open. Here was an excellent place to gossip. Travelers brought tidings from all parts. If citizens or officials were getting suspicious it would surely be talked at this place sooner or later. Murrell was a scientist in his own way. He had a mission; and he seems never to have lost sight of it. He had his frolics and his sprees, and at times he let his passion for counting other people's money get the best of his better judgment, but the man was never fickle in his purpose. From the resorts at Shawneetown the outlaw and his confederates could watch the traffic go by and calculate upon its possibilities. But to the people in the little frontier village Murrell was just another sucker, spending money recklessly. He was too shrewd to attempt any crimes near the fort. Nobody suspected Murrell because of his money. He had the bearing of a man of wealth. No one questioned these things at Shawneetown anyway.

"Business" around Fort Jesup was left to an associate gang. Not a great deal was known about the associate gangs of Murrell, or just what kind of an outlaw confederacy existed in No Man's Land, but there were several minor gangs over which Murrell exercised some control. What the system of organization was, just what allegiance the lesser chiefs held for the outlaw king, has never been determined. But

in their own mysterious way they had their codes and rules.

Perhaps the boldest of Murrell's lieutenants in the Free State was Hiram Midkiff, the leader of a band of horse thieves. The Free State had been ideal for the horse rustler. Horse stealing had been one of the most thriving businesses of the district. Horses were stolen in Texas and run into the Neutral Ground, from which place they might be taken with ease to any more eastern market that might suit the convenience of the thieves. It often happened that horses were stolen in Texas, sold in the Neutral Ground, re-stolen and carried back to Texas for re-sale. It was a racket that the professional horse stealers perfected to a system.

Hiram Midkiff lived a double life. In many ways he resembled Murrell. Midkiff posed as a horse trader. On the commissary porch at Fort Jesup he whittled sticks, chewed tobacco, and swapped yarns with the officers of the fort and citizens of the community, and carried on as a regular fellow. His extensive riding about the country became noticeable, but no one could pin anything definite on him. Such were the habits of the old time horse trader.

But for a long time he was under suspicion, and citizens in their frontier way referred to him as a dangerous man. But no one ventured to make an accusation; it was considered best to be polite to him. And through fear the horse rustler commanded a great deal of respect.

Midkiff played a bold part, and his success seems to have given him too much confidence. The beginning of the end came in a rather blunt manner. One day a slave belonging to Henry Stoker, a pioneer of the Fort Jesup community, came to his master and remarked in a distressed manner that Midkiff "said for me to bring him the horse, but I'm not going to do it." It was so sudden that Stoker was puzzled for a moment. But upon a minute's reflection he sensed the plot. He questioned the negro and found that the horse thief had planned for the negro to bring his master's best horse to him in the woods.

Stoker ordered the negro to lead the horse to the spot that Midkiff had designated. It was learned that the negro was to whistle as a signal to Midkiff. Stoker ordered his negro to carry out the instructions exactly as Midkiff had given them to him, but instructed him to get out of the way just as soon as he handed him the reins.

Early that night Stoker went to the spot where his horse was to be delivered and hid nearby behind a log. He had with him two sons and two neighbor boys, whom he also stationed nearby.

Later in the night the slave came with the horse and whistled his signal at the designated spot. Midkiff appeared immediately, his rifle across his arm, cocked. Stoker shouted at him to halt. No sooner said than Midkiff's rifle cracked. Stoker, already in a squatting position, fell over backwards, just as the bullet whizzed over his head. Stoker then aimed quick-

ly and fired. The bullet took effect in Midkiff's right breast.

Stoker and his boys set out for Fort Jesup with Midkiff, who struggled desperately every step of the way to escape. They noticed him making strained movements with his right arm. And if Stoker's bullet had not handicapped the arm, serious consequences might have resulted in the dark. For on his left shoulder was found a scabbard containing a long knife. When he had attempted to reach the knife with his left hand, the movement was so awkward that the weapon was discovered before he got his hand on it.

Midkiff was sullen. Long into the following day the citizens worked with the horse thief, questioning him. But he refused to talk.

Finally General Twiggs, an officer stationed at Fort Jesup, brought the questioning to a close. He threw a rope around Midkiff's neck and said: "We'll make him talk."

The weakening thief insisted that if they would promise to give him his freedom he would tell everything, and assured them that they would never be bothered with him again. He explained that after talking he would be forced to leave the country or his own men would kill him. Whether the men at Fort Jesup, seeing that he was dying, made the promise, or whether he volunteered, or in his delirium told, enough was learned for a posse to find his camp.

On a small creek, near the present town of Fisher, Louisiana, the posse located his camp that night. Mid-

kiff had excellent headquarters for an outlaw. To the east were the great open forests of virgin pines; and to the west, extending to the Sabine River, were ridges of beech and oak with their thick undergrowth. It was an unsettled, broken country of hills and winding creeks and bottoms. And nearer the Sabine River was a wilderness of swamps and canebreaks, a refuge for any fleeing bandit.

Shortly after dark the posse surrounded his camp. All night they waited silently in the undergrowth near the house. Early next morning one of the men, known as Tiger Bill, came out of the house to get firewood. He saw the men, wheeled and dashed madly toward the house. But a bullet dropped him before he reached the door. The bullet took effect at the point where his suspenders crossed. His back was broken. He fell to the ground face down, wiggling like a snake, yet struggling to make it to the house. And it was Midkiff's own rifle that had fired.

Four or five other men were captured. When the posse returned to Fort Jesup Midkiff was dead. Whether the capture included all of the Midkiff band or not was not known. But it definitely broke up horse stealing around the fort.

Murrell personally did not dabble much with horse stealing in the Free State. He was beginning to design bigger things.

Ideal as the location was for the outlaw, it was not sufficient to hold Murrell for a great length of time. He had enough foresight to realize that sooner

or later international difficulties would be cleared, and the outlaw empire would be rubbed out. Though an excellent place for the freebooter, it was, after all, a rather small place. Murrell was always scouting for something better, something bigger.

In the Free State of Sabine Murrell heard much talk of the marvelous opportunities of the Spanish Territory to the west, a land described as rich, and sure to become the most prosperous part of the continent. It was still unsettled and only partly civilized, but no one could calculate the great wealth that lay hidden there. Fabulous fortunes would be amassed there as if by magic!

Now that soldiers had marched into his Happy Hunting Ground, and his men were being shot down, he decided to look about for better territory. So he crossed the Sabine and set out for the Spanish Territory to see what there was to those fantastic tales he had been hearing.

**Item No. 2****FOLLOWING THE SPANISH TRAIL ACROSS  
THE "NEUTRAL TERRITORY" IN LOUISIANA**

By LEON SUGAR of Lake Charles, La.

The route across the American continent trod by the Citizenry of Spain wound and wended and twisted in irregular lines and turned at rambling angles, but from sun to sun unfailingly it went. The route is now overgrown with weeds and briars, with farms and villages, with cities and with sovereign states, but, for all that, we can follow it by the foot prints still trailing on—here some sojourner tarried for a rest, then tarried longer, and then founded a home; there a stream, a hill, a valley, to which still cling the romantic names that befell them; and thus, link by link, we follow from ocean to ocean.

The imprint of Spanish occupancy is not deeply marked in the Calcasieu locality. In other parts of Louisiana and other localities, to the north, to the east, and to the west, reminders are numerous and prominent. "The Calcasieu country" wrote Judge Xavier Martin, in 1827, "is a barren waste." The Spaniards seemed to have no greater appreciation; they claimed sovereignty and they passed back and forth across it, possibly because it was convenient, but otherwise they paid it small attention.

The western boundary of the Province of Louisiana and of the State of Louisiana was for a long time involved in much obscurity. When France ceded Louisiana to Spain (1762) and when Spain restored

Louisiana to France (1803) and when France sold Louisiana to the United States little was known or cared about the geography of the country they were peddling. The ignorance of the participating high dignitaries was glossed over with language, sonorous, but loose and far from, even approximate, precision. This ignorance, or carelessness was the cause of great trouble and led to many bloody battles.

A strip of country on the western edge of Louisiana, long in dispute between the United States and Spain, was known as the "neutral territory." As a matter of fact it was far from neutral. There were many contentions between settlers of different allegiance. This, however, more particularly applies to the country further north. The land records for this vicinity show very few names that bespeak Spanish nativity. The records make mention of settlers who were here in early days but names like Thompson, Smith, Perkins, King, Ryan, etc., are not suggestive of Spanish ancestry.<sup>1</sup>

After the treaty of 1819 between the United States and Spain, the United States recognized and respected the land grants made by Spain, but did so only after the claimant produced absolute proof. With few exceptions, the early cessions of Calcasieu lands made by the United States were to actual settlers.

The act of congress of March 3, 1823, provided "that all that tract of country situated between the Rio Hondo and Sabine river, within the

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<sup>1</sup> American State Papers, Vol. IV, p. 146.

State of Louisiana, and previously to the treaty of the 22nd of February, 1819, between the United States and Spain, called the neutral territory, be and the same is hereby attached to the district south of Red river; and the register and receiver of the land office in said district are required to receive and record all written evidences of claim to land in said tract of country, derived from, and issued by, the Spanish Government of Texas, prior to the 20th day of December, 1803, according to the regulations, as to the granting of lands, the laws and ordinances of said government, and to receive and record all evidences of claim, founded on occupation and habitation, and cultivation."

An attempt to ascertain, or define, the boundaries of the so-called neutral territory is found in the testimony taken before the register and receiver of the Natchitoches land office in 1824.<sup>2</sup>

Testimony of Samuel Davenport. "The neutral territory comprehends all the tract country lying east of the Sabine and west of the River Culeashue, Bayou Kisachey, the branch of Red river, called Old River, from the Kisachey up to the mouth of Bayou Don Manuel, southwest of Bayou Don Manuel, Lake Terre Noir and Aroyo Hondo, and south of Red river, to the northwestern boundary of the State of Louisiana."<sup>3</sup>

Testimony of Jose M. Mora. "I have no other knowledge of the neutral territory, as to its boundaries, but from the Rio Hondo to the Sabine river."

Testimony of Gregorio Mora. "In the years 1794

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<sup>2</sup> *Ibid.* 89.

<sup>3</sup> *Ibid.* 90.

and 1795 I collected the tithes of all the residents who lived or who had stocks west of the River Culeashue, of the Bayou Kisachey, of the Bayou Don Manuel and Rio Hondo, and south of Red river, which were at that time within the jurisdiction of Nacogdoches and on the line of the Providence of Louisiana.”

Orthography and geography do not seem to have given any worry to our pioneers. When not opposed by superior force they went as they wished; and when they spelled a word they went according to the law of least resistance. When one of them trimmed his quill pen self-respecting letters that objected to orthographic mesalliance had to find safety in rapid flight.

A number of parties appeared and submitted written documents in support of their land claims. These documents are quaint and interesting, but only a glimpse at them can be given here. It appears that the land grants under Spanish authority needed to be followed up by placing the grantee in actual physical possession.

The following copy of a “process verbal of possession” is almost (except for change in names and description of land) word for word, like all. And, like all, it shows a lack of fixity in boundaries, but characteristically, verbosity is sought to make up for lack of precision.<sup>4</sup>

“On this 29th day of December, 1795, in compliance with the foregoing decree, I, Jose Cayetano de Zepeda, *sindico procurador del comun Pueblo de*

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<sup>4</sup> *Ibid.* 111.

Nuestra Senora del Pibar de Nacogdoches, went with the witnesses of my assistance, Don Jose de la Vega and Vincento del Rio, to the place called Bayou of the Adaise, where the petitioner claims, and has built his house, in order to give to the said D. Pedro Dolet, who is now living on the premises, possession according to the decree; wherefore, being at the designated place on the Bayou of the Adaise, and having inquired whether any of the neighbors would be injured by this grant, and having well ascertained that there was no impediment whatever, and that none of the boundaries of the adjacent proprietors intersected or touched those designated by Pedro Dolet in his foregoing petition, for which reason no injury can result to the nearest neighbors by giving Pedro Dolet possession of the land he claims in his petition, with all the extent and the boundaries therein mentioned; I have visited those boundaries, and the land they surround, with the aforesaid witnesses of my assistance, and the said Pedro Dolet, and, taking the latter by the right hand, I went with him a certain number of paces from north to south, and afterwards from east to west; and then, having let his hand go, he went as he pleased on the said land of Bayou of the Adaise, pulled up grass, made holes in the ground, planted stakes, cut bushes, threw dust into the air and on the ground, and performed several other things and capers, as evidence of the possession which I had given him in the name of his Majesty, whom God preserve, of the said land, with the extent and boundaries which he has demanded, and in proof of the property which he now holds in it as sole master by virtue of this act of possession, and, also, as a

symbol of the right of property which he forever holds on said land, of one league on each course of the compass, in the manner, place, and with the boundaries expressed in his foregoing petition, with all uses and privileges thereunto belonging; and, afterwards, I have designated the aforesaid tract of land by the name of San Pedro de las Adaise, so that it may forever go by that name; and, in order that said Pedro Dolet may be forever quieted in the peaceable enjoyment of his said land agreeably to law, and, that the evidence of his right may appear, I have signed these presents, with the witnesses of my assistance, at San Pedro de las Adaise, the day, month, and year aforesaid.

“JOSE CAYETANO DE ZEPEDA

“Jose Luis de la Vega

“Vincente Del Rio.”

It is left for the reader to imagine what other possible capers were left not performed.

The treaty of 1819<sup>5</sup> and the congressional act of 1823 locate the Aroyo Hondo as in Louisiana and east of Sabine River. Quite likely the reader in Imperial Calcasieu would have as much difficulty in finding the Rio Hondo as in finding the Culeashue. On some of the older maps our lovely Calcasieu river is many times noted as Bayou Quelqueshue and sometimes as Calcasheu—never Quelquechose, as some think was the original name. This country was roamed over and at times occupied by Indians and not always by the same tribe, and there is authority, apparently well founded,

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<sup>5</sup> Treaty with Spain, Feb. 22, 1819.

for the statement that "Calcasieu" is derived from a certain Indian word meaning "Eagle."

As late as 1831 in an act concerning elections to be held in the Parish of St. Landry, it is recited "That hereafter the votes to be received in the additional precinct election, shall be taken at the house of Rees Perkins on the River Calcasieu, in lieu of Stephen Henderson's." <sup>6</sup> Some comparatively short time after the year 1800 there was a settler on Calcasieu river named John Henderson. His home was some eight or ten miles further up the river than the settlement of Rees Perkins.

The name of Rees Perkins, as a land claimant, appears more than one time in the reports. The house referred to in the act of 1831 was probably on the "Tract of land lying within the late neutral territory, situated on the right bank of the west branch of the Quelehue river, at a pine bluff about three miles from the mouth of said branch \* \* \*" <sup>7</sup> <sup>8</sup> There are lines on the old maps that, to the mind of the writer, indicate that there was a ferry across Calcasieu river at a point near what is even unto this day known as Perkins' ferry; and that the Old Spanish Trail, from east to west and from west to east passed over Calcasieu river. It is quite probable that the existence of a ferry across Calcasieu river and the existence of a road easily followed led to the change of voting precinct.

In 1824 <sup>9</sup> the state of Louisiana granted to Hy-

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<sup>6</sup> Act (La.) No. 3 of 1831.

<sup>7</sup> U. S. Township plat—Survey approved Mar. 3, 1832.

<sup>8</sup> Rio Hondo Claim No. 263.

<sup>9</sup> Act (La.) of Feb. 28, 1824.

polite Guidry the exclusive privilege of establishing and keeping a ferry over the River Mermentau (this name was sometimes in those days spelled Mermenton) at the place where the said river intersects with the Nez Pique. This act was amended in 1826<sup>10</sup> and this time the name was spelled Mementao. Ignorance of, or indifference towards the Calcasieu country is noticeable.

Calcasieu parish, formerly a part of St. Landry parish, was created in 1840.<sup>11</sup> Its eastern boundary is given as the River Mermentou. In the following year the privilege of keeping a ferry about two miles below the mouth of the Nez Pique was granted to James Andrew, Sr., and he was required "to keep and maintain in perfectly good order a ferry-boat or flat sufficient at all proper times to transport and ferry across the said River Mermentau all such wagons, horses, cattle, persons and property as may present themselves to be ferried across said river, and such ferry-boat or flat shall at all times be provided with a good railing on each side thereof, lengthwise at least four feet high." In a paper like this it is not quite proper to discuss the possible consequences of a wagon, either horse-drawn or cattle-drawn, presenting itself for transportation across the river.

A considerable number of people were established along the Mermentau river; very few west of there; and this may account for the seeming neglect of the state of affairs in what had been the "neutral terri-

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<sup>10</sup> Act (La.) of Feb. 3, 1826.

<sup>11</sup> Act (La.) 172 of 1840.

tory." Certainly no great wealth existed about here, for in the year 1841, Act 96 (La.) of 1841, it was provided that there should be two assessors in the Parish of Calcasieu, each of whom was to receive the salary of \$160 a year—one-half to be paid by the State and one-half to be paid by the parish.

Large oaks from little acorns (sometimes) grow. The reader will find on the map of Louisiana, up near the city of Natchitoches, a small black line noted as "Rio Hondo." In the testimony taken at Natchitoches in 1824<sup>12</sup> there are a number of references to the Rio Hondo. One of the witnesses places it about six miles west of the town of Natchitoches; another witness testifies that the land of a certain claimant lies "Within the late neutral territory, situated about a quarter of a mile from the Aroyo Hondo, on the road leading from the town of Natchitoches to Gaines' Ferry on the Sabine river, bounded on the west by the Aroya Hondo \* \* \* \*"

The most interesting testimony pertains to the land claim of "Edward Murphy." The testimony submitted by Edward Murphy, was in writing and as follows:

"Sen. Lieutenant Governor: Edward Murphy, of the post of Natchitoches, part of the province of Louisiana, presents himself before you, and says, that on the margin of a creek named Aroya Hondo, which separates the two provinces on the side of the province of Texas and on the margin between the royal road and another which passes by the Bayou St. John, there is a cove which

<sup>12</sup> Am. St. Papers, Vol. IV, p. 89.

I find so advantageous for collecting my cattle, I beg your honor would please to grant me possession of those lands, from which I shall reap great advantage having no place to collect my cattle; and, moreover, to grant me on this paper, there being none stamped: humbly ask of your honor that it may please you to give me possession of said land.

“Nacogdoches, October 17, 1791.

“MORFIT.”

“Nocogdoches, [*sic*] October 17, 1791.

“In consequence of the petition, and that the land solicited is in the province of Texas, and vacant, I do grant it in due and best form, and that it may so appear, I sign this at Nacogdoches, October 18, 1791.

“ANTONIO GIL Y BARVO.”

There are further numerous references to roads, to ferries, and to Spanish villages, in the country about Natchitoches, but no mention is found of Spanish villages in the Calcasieu territory, nor is there found any mention of highways and roads except the “Old Spanish Trace.”

One, George Fogleman, “filed his notice claiming, by virtue of settlement and occupancy prior to February 22, 1819<sup>13</sup> a tract of land, lying within the late neutral territory, situated on the west side of the Quelqueshue river on the Spanish Trace, about two miles above Charles’ lake.”

James Answorth, Ja., “filed his notice claiming by virtue of settlement and occupancy, a tract of land

<sup>13</sup> American State Papers, Vol. IV, 138.

lying within the late neutral territory, situated on the west side of the Quelqueshue river, and on the west side of Show Pique Bayou, about 15 miles above the entrance of said bayou into the Quelqueshue river, at the crossing of said bayou which is about two miles south of the Spanish Trace.”

Henry Moss “filed his notice claiming, by virtue of inhabitation, occupation and cultivation, a tract of land lying within the late neutral territory, and situated west of the Bayou Quelquesheu, on the waters of the Bayou d’Inde<sup>14</sup> about two miles below and south of the Old Spanish Trace to the Sabine.”

James Barnett “filed his notice claiming, by virtue of occupation, inhabitation and cultivation, a tract of land situated on the River Sabine at the Old Spanish Crossing, having a cabin on each side of the road.”

There is further testimony to the effect that George Orr and Abel Terrall settled on this tract of land in the year 1818, and that it was “under good fence.”

Thus ends the Calcasieu section of the “Old Spanish Trace.” If the reader would follow along further he must cross the Sabine and find his guide in the land that once was known as the Spanish Province of Texas.

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<sup>14</sup> A common error: Should be Bayou Dinde—Turkey Bayou, 112 La. Rep. 218.

**Item No. 3**

**THE LIBRARY OF CONGRESS**

WASHINGTON, D.C. 20540

REFERENCE DEPARTMENT

GEOGRAPHY AND MAP DIVISION

November 8, 1972

Dear Mr. Sole:

In response to your telephone request of November 7, enclosed are complimentary xerox copies of the 1838 map of Louisiana, and the text portion describing the boundaries, from Thomas G. Bradford's *An Illustrated Atlas . . . of the United States* (Boston, Weeks, Jordan and Co., 1838).

Sincerely,

WALTER W. RISTOW

*Chief*

Enclosures

Mr. Emmitt Sole

P.O. Box 2900

Lake Charles, Louisiana 70601

EXTENT. BOUNDARIES. The State of Louisiana comprises that part of the old Territory of Louisiana which lies south of  $33^{\circ}$  N. Lat., and the section of the Province of West Florida west of the Pearl River, and south of  $31^{\circ}$  N. Lat. The western bank of the Sabine from its mouth to the 32d parallel, and a straight line drawn thence due north to the 33d parallel of latitude, form its western boundary, the latter parallel is its northern limit to the Mississippi; that river is its eastern boundary to  $31^{\circ}$ , and Pearl River from thence to its mouth. The strip north of the Iberville and the lakes, and between the Mississippi and the Pearl River, was added to the State soon after it was admitted into the Union. Within the limits thus described, Louisiana, extending from  $29^{\circ}$  to  $33^{\circ}$  N. Lat., and from  $88^{\circ} 40'$  to  $94^{\circ} 25'$  W. Lon., with a broad front of about 300 miles toward the sea, and a length of 260 miles from north to south, has an area of about 48,500 square miles; in the central part its breadth suddenly contracts to about 100 miles, but expands again in the north to 180 miles.

## Item No. 4

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SMITH TO DONELSON

DEPARTMENT OF STATE

*Washington on the Brazos.**February 10, 1845*

The Undersigned, Secretary of State of the Republic of Texas, has the honor to acknowledged [*sic*] the receipt of the note of the Hon. A. J. Donelson Chargé d' Affaires of the United States of America, bearing date the 2d Decr. 1844. together with the accompanying documents, in relation to a complaint made against the Collector of the Customs at Sabine in Texas, inasmuch as this officer required the payment of tonnage duties from certain American vessels resorting to the port of Sabine for commerce.<sup>a</sup> The right of every nation to make those interior regulations respecting commerce and navigation which it shall find most convenient to itself and to reserve to itself the liberty of admitting at its pleasure other nations to a participation of the advantages of its commerce, is a doctrine which has received the solemn and repeated sanction of the American Government, and will not, it is presumed, be controverted by the Hon. Mr. Donelson. On this clear principle the Government of Texas may of right establish the conditions on which they will ad-

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<sup>a</sup> Opposite the beginning of this sentence in the margin are written the words, "Treaty between France and the United States of 1778, preamble."

mit other nations to come to their shores and receive the products of their soil or carry on commerce with their inhabitants; and they may require as one of the conditions of vessels trading with their port of Sabine the payment of dues or tonnage duties.

The town of Sabine in Texas is a commercial *port*; the adjacent country along Sabine Bay is washed by navigable waters; and the whole is subject to all the uses and incidents appertaining to a coast bordered by navigable waters. The port in question cannot be used except as a *port*, a *maritime depot*, for ordinary commercial purposes, neither can it by any fiction be regarded in any other light. If Sabine be not used as a *port* it cannot be used for commercial purposes at all; and the Gov't of Texas, as already intimated, may require as one of the conditions on which they will allow foreign vessels to trade with this port, the payment of tonnage duties; and if the payment of these duties be refused may bring to all vessels so refusing and compel payment. Relatively to this point, the undersigned begs to cite Mr. Jefferson who in 1792, then Secretary of State under General Washington declared in a communication on a matter similar to the one now under discussion that, "the right to use a thing comprehends a right to the means necessary to its use and without which it would be useless." And this doctrine has been since explicitly asserted by all the American text writers on International Law and solemnly affirmed and acted on by the American Government. If moreover the use of such means be refused on a plea of "jurisdiction" or the use so shackled by unnecessary regula-

tions as to render it unavailable by Texas, it then becomes an injury of which Texas may demand redress.

If the Government of Texas do not possess the right to collect tonnage dues and establish the other customary regulations of commerce for the port of Sabine, then have we at Sabine the most absolutely free port in the world, and there exists no authority anywhere to regulate or supervise the commerce that may be carried on thereafter. The undersigned does not suppose that the Hon. Mr. Donelson on the plea of "jurisdiction" would claim for his Government the right to establish a custodial use at the Sabine to regulate the commerce of the port, thus making the soil of Texas appurtenant to the water which washes its shores. The authority to regulate the commerce of the port in question must exist somewhere. The undersigned believes it is vested in the Nation owning the *terra firma*. Custom Houses are established on *land* and not on the *water* although their operation extends over the water.

If the right contended for by Texas exist at all, it is and must of necessity be exercised as a *perfect* right, otherwise it would be utterly nugatory. It would be idle to establish regulations for the commerce carried on upon its coast, if vessels in sight and even within short gun shot of the shore may openly set at naught or evade those regulations. And a limited jurisdiction for this purpose must be exercised by Texas over the adjacent waters.

So bold an evasion and flagrant a violation of the

revenue laws of Texas as has been attempted by the averment that the commerce between the shore and foreign bottoms has been carried on by means of flat boats or keel boats, will not surely be justified by the Hon Mr. Donelson. To prevent like audacious frauds, England and the United States claim and exercise for this special purpose a jurisdiction of twelve miles from their coasts respectively, within which distance they will not allow such fraudulent trans-shipments to be made.

By the terms of the Treaty of 1819, made between Spain and the United States, renewed in 1828, between Mexico and the U. States and finally established in 1838 between Texas and the United States, as the basis for running the boundary line, without any change of language so far as relates to the boundary and the waters of Sabine Bay; it is declared that the “use of the waters and the navigation” of the Bay are common to the inhabitants of both countries. This stipulation is declaratory of the right of Texas to the use of the waters in question, and is as clear and essential a portion of the Treaty as that which establishes the boundary line along the Western bank of these waters.

The undersigned has entered into a brief argument above to show on sound principles of public law and from the necessity of the case, that a *barren* use was not intended—a bare permission to sail in and out of Sabine Pass—but a beneficial use for all things which may be lawfully done on shore. If foreign vessels

resort to the port of Sabine to receive the products of Texas, the Nation owning the land and this nation alone, can impose tonnage duties and if necessary can go upon the water to enforce the collection of them by virtue of their right of use solemnly recognised in the Treaty in question. It would be violative of the best established of all rules of interpretation so to interpret the "*jurisdiction*" as to exclude the *use*; both rights repose on the same basis and are not incompatible; effect must therefore be given to both. No incompatibility or conflict can arise, inasmuch as the United States cannot claim to establish custom houses at the port of Sabine nor collect duties upon Texian [*sic*] soil on the products shipped or foreign merchandize imported there; To do these acts appertains of right exclusively to Texas on principles of public law and by the provision of the Treaty of Boundary.

The Undersigned cannot therefore admit the opinion expressed by the Hon. Mr. Donelson that "the authority to collect these duties cannot be recognized by the United States without a surrender of their jurisdiction of the waters of Sabine pass, Lake and river"; on the contrary he conceives that the Government of Texas have a perfect right to collect these duties and to the "use and navigation" of the waters in question for this purpose, and their collection does not conflict with the just claims of the United States nor afford that Government any good cause of complaint. He cannot believe that the Government of the United States propose so to stretch the interpretation to be given to their "*jurisdiction*" as to sustain their citizens in

violating those laws which the people of Texas may legitimately establish, as a condition of commerce with them.

The undersigned embraces this opportunity to present to the Hon. Mr. Donelson assurances of the high consideration with which he has the honor to be.

Most Respectfully

His Very Obedient Servant

(signed)

ASHBEL SMITH

Hon. A. J. DONELSON

*Chargé d'Affaires of the United States of America  
etc. etc. etc.*

## Item No. 5

25TH CONGRESS  
2d Session.

[House Doc. No. 365.]

HO. OF REPS.  
War Dept

OBSTRUCTIONS IN SABINE RIVER.

LETTER

FROM

THE SECRETARY OF WAR

TRANSMITTING

*A Report respecting the Removal of Obstructions to the  
Navigation of the Sabine River.*

MAY 7, 1838.

Read, and laid upon the table.

DEPARTMENT OF WAR, May 5, 1838.

SIR: I have the honor to transmit, herewith, a report of the Commanding General of the army, which is accompanied by a copy of that of Major Belknap, "with respect to the removal of the obstructions to the navigation of the Sabine river," called for by a resolution of the House of Representatives of the 1st instant.

Very respectfully, your most obedient servant,

S. COOPER,  
*Acting Secretary of War.*

HON. JAMES K. POLK,  
*Speaker of the House of Representatives.*

HEADQUARTERS OF THE ARMY,  
*Washington, May 4, 1838.*

SIR: In conformity with a resolution of the House of Representatives of the 1st instant, I herewith transmit a copy of the report of Major Belknap, of the 3d regiment of infantry, with respect to the removal of the obstructions to the navigation of the Sabine river, together with the accompanying papers and map, marked 1, 2, 3, and 4.

Very respectfully, sir, your obedient servant,

ALEX. MACOMB,  
*Major General, commanding in chief.*

To the SECRETARY OF WAR.

PROPERTY OF  
UNITED STATES GOVERNMENT  
US-CE-S

## CAMP ON THE SABINE LAKE,

*Near the mouth of the Sabine river, (La.,) March 24, 1838.*

SIR: I have the honor to enclose, herewith, a sketch of the Sabine river, from Camp Sabine to the sea, together with a statement of the acting assistant quartermaster, showing the expense incurred in rendering it navigable for steamboats, and the copy of a letter from the master of the steamboat Velocipede, on making his first trip.

The chart of the lake and pass you will find to be somewhat different from the one furnished me from the Engineer department. This, however, is correct. It was made by Lieutenant J. H. Eaton, of the 2d infantry, after a most careful and minute examination.

I have the honor to be, sir, your obedient servant,

W. G. BELKNAP,  
*Major United States Army.*

To Maj. Gen. A. MACOMB,  
*Commanding in chief U. S. A., Washington city.*

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No. 2.

SABINE PASS, *March 23, 1838.*

DEAR SIR: From your report of the navigation of the Sabine river, I have been induced to make the trial, with the steamboat Velocipede of 143 tons burden, (carpenter's measure,) 133¾ feet in length, 60 foot beam, with guards of 14 feet, drawing five feet water; and I am honored to inform you that I have succeeded in ascending and descending the river from the town of Sabine, a distance of about 300 miles, without the slightest injury to my boat.

Your success has been beyond the expectations of the oldest inhabitant on the river; and your labor has enhanced the value of all lands adjacent to the river at least two hundred per cent.

The raft, formerly considered impossible to be removed, I found no difficulty in ascending or descending.

The price of freight from *Natchitoches* to *Camp Sabine*, has herewith cost about five or six cents per pound; and by the *Sabine river*, from *New Orleans* to *Camp Sabine*, the freight will cost two cents per pound.

Yours, respectfully,

ISAAC WRIGHT.  
*Captain steamer Velocipede*

Major BELKNAP.

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No. 3

ASSISTANT QUARTERMASTER'S OFFICE,  
*Camp on Lake Sabine, (La.,) March 24, 1838.*

SIR: I have the honor to state to you, in compliance with your request that the expenses of the quartermaster's department, incurred by the clearing out and rendering navigable for steamboats, the Sabine river, were as follows, viz:

1st. For extra pay to the troops .....	\$ 893.42
2d. For articles expended, purchased by myself....	36.65
3d. For articles expended, purchased by assistant quartermaster, Lieutenant E. B. Alexander, rough estimate .....	369.93
Total .....	<u>\$1,200.00</u>

In the estimate of articles purchased by Lieutenant Alexander, I have neither overrated the value.

I am, sir, very respectfully, your obedient servant,

A. G. BLANCHARD,

*1st Lieut. 3d Infantry, Acting Assistant Quartermaster.*

Major W. G. BELKNAP,  
*Commanding expedition.*







# LOUISIANA.

Scale of Miles  
0 10 20 30 40

Don 365 B. X. 1838  
25<sup>th</sup> Congress  
2<sup>d</sup> Session, 1838.

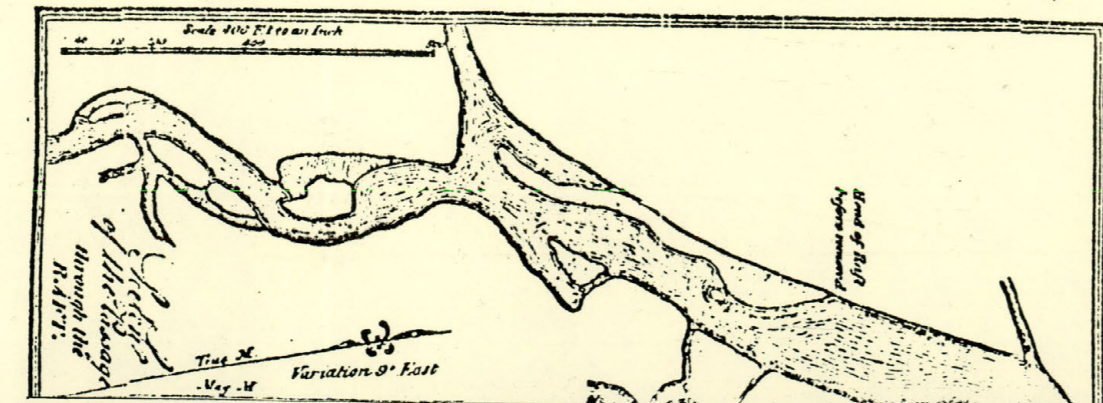
Old River  
New River  
Yellow River  
Low - Murky Prairie  
Oreans High  
Blaine's Bayou  
Cypress Creek  
Old River  
Ferry Landing  
Belows Ferry  
Termination of the  
Low Murky Prairies, extending to the City  
Columbia Bayou  
M. Williams' Mill  
Mill race to Cascade  
M. Williams' Mill  
M. Williams' Mill  
M. Williams' Mill

Sketch of the  
CHANNEL  
through the  
PASS.

Scale 1 1/2 Miles to an Inch.

SKETCH  
of the  
CHANNEL  
through the  
PASS.

Scale 1 1/2 Miles to an Inch.



**Sketch**  
of the  
**SABINE RIVER**  
**LAKE and PASS**  
*from Camp Sabine to the*  
**GULF**  
A Distance of about  
**300 MILES**  
Lieut. J. H. Eaton, 3<sup>d</sup> U.S. Infantry.  
Scale, 4 Miles to an Inch.

From the Lana Cañon to the fern of the river (Narrows) the banks vary in height from 2 to 4 feet—excepting the Bluffs which are from 10 to 50 feet high above low water. Williams Bluff and the next Bluff below on the Lewis side are about 12 feet above low stage of water. The overflow in this distance above the banks is from 2 to 4 feet.

The Height of the Banks above low water varies between 6 and 15 feet through an extent of the River from Gaines Ferry to Beyond Lana Cañon; the country in the immediate vicinity of the River is subject to an Annual overflow of from 4 to 10 feet above its banks, continuing usually about 3 months.

True Meridian.  
Variation 9° East  
Mag. Meridian.

..... { From the Luna Cane to the fork of the river (Narrows) the banks vary in height from 2 to 4 feet - excepting the Bluffs, which are from 10 to 20 feet high above low water. Wilcox's bluff and the next bluff below on the Iowa side are about 12 feet above low stage of water. The overflow in this distance above the banks is from 2 in. to 1 foot.

The Height of the Banks above low water varies between 6 and 15 Feet through an extent of the River from Gaines Ferry to Rhyon Lana Cauca, the country in the immediate vicinity of the River is subject to an Annual overflow of from 4 to 10 Feet above its banks, continuing usually about 3 months.

*Route maximum height 1000 feet, according Ruffin. Width of stream from 40 to 50 Yards.*

July 21 DIVISION, UNKNOWN, PROBABLY RISE  
in the prairie lands and before reaching  
with the same form much increased by  
stream leaving the main river in the  
sequence of the elevation of the high

\* Upper end of the river which empties into the main stream by small rapids.

True Meridian. Variation 9° East  
Magnetic Meridian.



